

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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~~CONFIDENTIAL~~

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,556

FRIENDS OF THE EARTH, and
GARY A. SOUCIE,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

CITIZENS FOR CLEAN AIR, INC.,

Intervenor.

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

APPENDIX TO BRIEF FOR PETITIONERS

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 9 1970

Nathan J. Paulson
CLERK

(i)

INDEX TO APPENDIX

	<u>Page</u>
Formal complaint against Television Station WNBC-TV dated March 14, 1970 to FCC from Gary Soucie, Executive Director of Friends of the Earth	1
Attachments to letter dated March 14, 1970 containing:	
a. Letter of February 6, 1970 to Television Station WNBC-TV from Mr. Soucie	11
b. Letter of February 18, 1970 from Weston J. Harris, Station Manager of WNBC-TV to Mr. Soucie in response to letter of February 6, 1970	17
Hand delivered letter of March 22, 1970 to Commission from Geoffrey Cowan containing complaint against WNBC-TV and enclosed documents	20
Supplement to complaint against WNBC-TV to the Commission from James W. Moorman, Attorney for Mr. Soucie and Friends of the Earth, dated April 7, 1970	22
Letter of June 20, 1970 to Commission from Jerome Kretchmer, Administrator of Environmental Protection Administration of the City of New York in support of Friends of the Earth . . .	27
Letter of June 23, 1970 to Commission from Barry Rein, Vice President of Citizens for Clean Air, Inc., enclosing letter which was sent in the form of a Western Union night letter of June 23, 1970	40
Letter of July 13, 1970 to Commission from Howard Monderer, Washington Attorney for National Broadcasting Company, Inc. enclosing a list of the programs discussing pollution broadcast by WNBC-TV January 1 through May 31, 1970	44
Letter of July 30, 1970 to Commission from Geoffrey Cowan with four attachments of newspaper clippings	56
Letter of August 5, 1970 to Gary Soucie from Ben Waple containing decision of Commission with regard to complaint against WNBC-TV	73
Dissenting Opinion of Commissioner Nicholas Johnson	89



App. 1

FRIENDS OF THE EARTH

30 East 42nd Street
New York, N. Y. 10017

March 14, 1970

Mr. Dean Burch
Chairman
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Dear Mr. Chairman:

Please regard this letter as a formal complaint against television station WNBC-TV, 30 Rockefeller Plaza, New York City, broadcasting on Channel 4 in New York City, for failure to fulfill its "fairness doctrine" and "public interest" obligations with respect to automobile and gasoline advertisements.

On February 6, 1970, we sent WNBC-TV a letter in which, after briefly describing the terms of the public controversy over air polluting automobiles, we noted some of the propagandistic effects of automobile and gasoline advertisements, and requested that the station "make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy." (See attachment.) Our request was grounded on the Federal Communications Act which, as interpreted in the Commission's landmark Memorandum Opinion and Order on "The Applicability of the Fairness Doctrine to Cigarette Advertising" and in the Court of Appeals Decision in *Banzhaf v. FCC* 405 F.2d 1082 (D.C. Cir. 1968), applies to automobile and gasoline commercials.

The station answered by a letter dated February 18, 1970, and signed by WNBC-TV Station Manager Weston J. Harris. (See attachment.) Mr. Harris concluded that "there is no necessity under the Fairness Doctrine for us to broadcast the announcements you suggest." His letter advances three arguments: First, relying on language in the Commission's original ruling of June 2, 1967, and on the Memo-

random and Order of September 15, 1967, he insists that the decision was "limited to this product—cigarettes." Second, he disputes our contention that automobile and gasoline advertisements contain assertions which relate to a controversy regarding the "pollution problem." Finally, he assures us that "the issue of air pollution, including the causes and effects of automobile emissions, has been extensively covered by WNBC-TV, and we believe that this coverage has more than fulfilled our obligations under the Fairness Doctrine." Copies of both letters are enclosed and made a formal part of this complaint.

We submit that WNBC-TV's arguments are wide of the mark. Each of the station's contentions is discussed briefly below. This letter was prepared with the assistance of our counsel, James Moorman, and Geoffrey Cowan of the staff of the Center for Law and Social Policy. We respectfully request the opportunity to present any further memoranda of law which might be of assistance to the Commission, and, if necessary, the opportunity for our counsel to present oral argument before the Commission.

1. *The "public interest" standard of the Federal Communications Act is not limited to commercials for cigarettes and, as interpreted by the FCC and the Court of Appeals, it logically covers commercials for automobiles and gasoline.* The first Commission ruling on June 2, 1967, was specifically limited to cigarettes since the complaint to which it was addressed involved only cigarette advertisements. Later rulings by the Commission have made clear, however, that the same principle would apply to other products. Mr. Harris suggests that the Commission's rulings on this subject are dispositive; however, the passage from the Memorandum Opinion and Order of September 15, 1967, relied on by Mr. Harris, says only that "instances of extension of the ruling to other products upon consideration for future complaints would be rare" The test posed by the Commission is whether the product's "Normal use has been found by Congressional and other

App. 3

Governmental action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance"

Today, it seems clear, the government's expressed concern about the air pollution caused by the normal use of automobiles more than meets this test.

"Air is our most vital resource," President Nixon pointed out in his February 10 message to Congress, "and its pollution is our most serious environmental problem." And, as the president noted in his State of the Union Message, "The automobile is our worst polluter of the air." The elimination of automobile-produced air pollution has become the Administration's top environmental priority.

The promotion of large-engine cars and gasoline with lead additives—with the suggestion that they are indispensable—raises a substantial controversial issue of public importance. The test is also met by the use of any car with a polluting internal combustion engine (or, indeed, of automobiles rather than mass transportation in cities like Los Angeles and New York). Interestingly, the Commission did not mention automobile-produced air pollution in listing the products in the "parade of horrors" which it did not believe offered analogous situations. In discussing the effects of the use of automobiles, the opinion spoke of automobile safety (which it distinguished from cigarettes) but not of automobile pollution.

In his concurring opinion in the cigarette case, Commissioner Loevinger pointed out that automobile pollution (unlike automobile safety) offered an apparently totally analogous situation. He said:

The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (para. 46), the normal use of automobiles does pose a health hazard, polluting the atmosphere to a degree that is

dangerous not only to those using the automobiles, but, even worse, in some localities to everyone, including infants and invalids. *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921, 954 (1967).

If the analogy was strong in 1967, it is far stronger today. In his February 10th speech the President proposed legislation to provide better vehicle testing procedures and legislation to authorize the Secretary of Health, Education, and Welfare to regulate fuel composition and additives. He also ordered the inauguration of a research program to develop "an unconventionally powered, virtually pollution-free automobile" within five years. In addition, as with cigarettes, Congress has already taken decisive action. The Clean Air Act of 1965, which regulates motor vehicle exhaust emissions, was supplemented by the Air Quality Act which became law on November 21, 1967. Further amendments to the Clean Air Act are currently being debated in the House of Representatives where the Committee on Interstate and Foreign Commerce began hearings on March 5, 1970. New government reports underlining the health hazards of automobile pollution appear almost weekly. Some are cited in our letter to WNBC-TV. The most dramatic report to date will be issued by the National Air pollution [sic] Control Administration in the near future. On March 5, the *Wall Street Journal* summarized a part of the report as follows:

Carbon Monoxide (CO), the most prevalent urban air pollutant, cuts the blood's oxygen-carrying capacity and in sufficient amounts can impair various body functions. Experts worry particularly that it can diminish an individual's ability to judge time and distance, and thus contribute to traffic accidents.

The new standards will set the threshold for adverse health effects from carbon monoxide at exposure to 10 parts per million for an eight-hour period. This level is far lower than current concentrations in many major urban centers. Los Angeles, for exam-

App. 5

ple, records carbon monoxide levels ranging up to 40 parts per million.

Although 75 per cent of the nation's carbon monoxide pollution comes from motor vehicles, the CO criteria will be important for two reasons: they will have a significant direct impact on the remaining sources of CO pollution, and they will establish the first Federal guidelines for health dangers from this pollutant. As such, the CO criteria ultimately could require the Federal Government to adopt even stricter controls on motor-vehicle exhaust emissions than those currently planned.

Indeed, the auto industry had hoped for a more liberal carbon monoxide criteria level of 50 parts per million, which might have minimized the auto maker's future pollution-control problems stemming from the internal-combustion engine.

The danger to health is particularly alarming in New York City. On March 8, 1970, the *New York Times* carried the following report:

Dr. Stephen M. Ayres, director of the cardio-pulmonary laboratory of St. Vincent's Hospital, says studies indicate that exposure to 50 parts of carbon monoxide per million parts of air for 90 minutes "may produce sudden changes in mental function."

But he cites studies that indicate maximum hourly concentrations in Queens Midtown and Brooklyn-Battery Tunnels as 132 and 64 respectively, and maximum hourly averages even on approaches to Triborough and Verrazano-Narrows Bridges as 128 and 86 respectively. (p. 73)

As the Senate Republican Policy Committee has pointed out, in a staff study issued on January 22, 1970, current efforts by the automobile companies to limit air pollution do little to offset this health hazard. Using documentation prepared in 1961 by Dr. John T. Middleton, professor of plant pathology at U.C.L.A. (now commissioner of the National Air Pollution Control Administration), and Diana

Clarkson, secretary of the State of California Motor Vehicle Pollution Control Board, the staff study (Republican Report No. 1-70, "Our Poisoned Skies") shows us how grim the picture is:

Based on the Middleton-Clarkson estimates, collectively the 104 million automobiles in the United States are emitting an overwhelming 47,500 TONS of hydrocarbons, 14,500 TONS of nitrogen oxides, and 296,670 TONS of carbon monoxide *every day* into the atmosphere over the Nation.

The Middleton-Clarkson estimates are based on the 1961 automobile. Since 1968, under Federal law, automobile manufacturers have been forced to adopt some pollution control devices. Environmental engineers contend that any advantage gained by these devices *is offset* by the higher power of the 1969 and 1970 cars. Additionally, they point out, the new devices *do not apply to old cars* and there are *more than 90 million* older cars still on the roads. Furthermore the devices *are not completely efficient*, and some of them adversely affect engine performance, so that there is a tendency to disregard or disconnect them.

2. *Advertisements for automobiles and gasoline—and especially for cars with large-displacement engines and for gasolines with a lead additive—generally convey a message which supports one side of the controversial automobile air pollution issue.*

There are several aspects of the fight to rid the air of automobile pollution. The effort will require both individual restraint and governmental action. In the short run, those who are asking for new steps to limit air pollution are asking drivers to buy small-engine cars and non-leaded gasoline. For the longer haul, they are demanding new legislation, stricter law enforcement by government administrators, and major voluntary changes by the automobile and oil industries. Advertisements currently broadcast by WNBC-

App. 7

TV directly contradict the public arguments on which both strategies must rely.

First, efforts to persuade drivers to buy small engine cars and non-leaded gasoline have already begun. In late February a group called Citizens for Clean Air picketed the Queens-Midtown Tunnel in New York. The picketers, whose number included Congressman Edward I. Koch and New York City Council Minority Leader Eldon Clingan, asked commuters to give city residents a break by filling up their cars with lead-free gasoline. There have been reports of similar efforts to persuade prospective car purchasers to avoid cars with large engines.

Advertisements which extol the virtues of leaded gasolines or large-engine cars necessarily argue for the other side of this debate. In our letter to WNBC-TV, we cited five commercials which illustrate the tone of automobile and gasoline advertising on television. We listed advertisements where leaded gasoline is treated as the only satisfactory fuel for cold-weather starting. We also cited commercials for cars with large-engines. The Chevrolet Impala, for example, stresses the great value of its size ("you don't have to be a big spender to be a big rider"), as does the Ford Mustang and Torino GT spot which stresses size ("4-barrel V-8" and "up to 429 cubic inches") and advocates "moving up to" a larger car. These ads imply that the good life is connected with the use of powerful cars with large-displacement engines and high-test leaded gasoline.

The second, and in some ways more significant, aspect of the fight to eliminate auto pollution involves the program enunciated by President Nixon in his February 10 speech: pass new legislation, enforce anti-pollution regulations as strictly as possible, and persuade the automobile and gasoline companies to convert their products to non-polluting ones as rapidly as possible. To a large extent, the success of these efforts will depend on the amount of public support generated on their behalf. The automobile and oil industries may be able to forestall such consequences if

they can imply to the public that they have already responsibly accomplished the anti-pollution reforms the President and citizens are seeking. Some advertisements imply that automobiles are consonant with an unpolluted environment (like the Ford Mustang commercial on a lonely beach, far from the air pollution that automobiles create), while others are more direct and portray the oil industry as a champion of environmental purity (like the Esso commercials that describe the environmental sensitivity of the pumps in one of the Standard Oil drilling fields, but do not mention that the company has thus far failed to agree to make lead-free gasoline). These commercials fall under the traditional fairness doctrine cases, where a station broadcasts only one side of a hotly contested political issue.

Mayor Lindsay's Task Force on Air Pollution summarized the problem in its report of October 28, 1969: "Finally, the best way to cut down on dangerous hydrocarbons in the air is to cut down on horsepower. Yet Detroit continues to glamorize and sell engines far more powerful than are functionally necessary or consistent with individual and public safety."

3. The kinds of programs cited by Mr. Harris as a part of the WNBC-TV regular programming schedule do not fulfill the station's statutory duty to make a fair presentation of opposing viewpoints on the controversial issues of public importance posed by automobile and gasoline advertising.

Both the Commission and the Court of Appeals, in their decisions on the cigarette case, pointed out some of the distinctions between advertising and regular programming. "We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the fairness doctrine," the Commission said, 9 F.C.C. 2d at 941. The Court of Appeals, in its *Banzhaf* decision was even more explicit:

In these circumstances, the Commission could reasonably determine that news broadcasts, private and

App. 9

governmental educational programs, the information provided by other media . . . inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. 405 F.2d at 1099.

Commercials have a second advantage which is not offset by public service programming. Besides their greater frequency they are also vastly more effective, designed as they are to appeal to the viewer's psyche rather than his intellect. Often, the producers of commercials will spend heavily on a 30-second spot, whereas a panel discussion costs almost nothing to produce. It would be naive to think that a discussion on the weekday-morning "For Women Only" show is any match for the 30-second prime-time ad for Ford Mustang and Torino GT.

While we do not doubt that WNBC-TV has presented some aspects of the automobile pollution problem, the programs listed in Mr. Harris's letter appear to fall far short of the Commission's "good faith" requirement. With the exception of "The Slow Guillotine" (an admittedly excellent documentary), only a few minutes of air time appears to have been devoted to this problem during the three months from November 16, 1969, to February 11, 1970. Moreover, two of the four programs listed by WNBC-TV were discussions of air pollution in which automobile pollution was only one of several concerns and where industry's position apparently was more than adequately represented. Such discussions or debates cannot be expected to offset the effects of the advertising campaigns of the automobile manufacturers and oil companies. In 1968 they spent \$284 million on television advertising, trying to promote the notion that cars and high-test gasolines are a social and economic necessity, and implying that automobiles are

now clean and adequate progress is under way in making them cleaner.

The relative expenditures of time and money in presentation of opposing views is in all probability indicative of the disparity in audience numbers and impact that would be demonstrated were the commission to conduct, or contract for, appropriate tests.

In light of the foregoing arguments, we submit that the Commission has the responsibility, duty, and the unique opportunity to make a major contribution to the effort substantially to abate automobile pollution in America. We therefore formally complain that WNBC-TV has broadcast and appears to be continuing to broadcast a large number of messages presenting only one side of a controversial issue of public importance, and that they have refused a proper and reasonable request to make corresponding free time available for messages presenting contrasting viewpoints. We specifically request that this complaint be investigated and that necessary and appropriate action be taken to bring WNBC-TV into compliance with the requirements of the Federal Communications Act.

Sincerely,

/s/ Gary A. Soucie
Executive Director

cc: Commissioner Robert T. Bartley
Commissioner Kenneth A. Cox
Commissioner Nicholas Johnson
Commissioner H. Rex Lee
Commissioner Robert E. Lee
Commissioner Robert Wells

Mr. George Smith, Chief, Broadcast Bureau
Mr. Henry Geller, General Counsel
Mr. William B. Ray, Chief, Complaints and Compliance Division
Mr. Robert J. Rawson, Chief, Renewal and Transfer Division
Mr. Weston J. Harris, Station Manager, WNBC-TV

App. 11

FRIENDS OF THE EARTH
30 East 42nd Street, New York, N.Y. 10017

CERTIFIED MAIL RETURN RECEIPT REQUESTED

February 6, 1970

Television Station WNBC-TV
30 Rockefeller Plaza
New York, N.Y. 10020

Gentlemen:

As a New York resident and an executive of an organization devoted to the preservation of the environment, I have been deeply troubled by some of the advertising campaigns broadcast over WNBC-TV. Spot advertisements for automobile and gasoline companies constantly bombard New York area viewers with pitches for large-engine cars and high-test gasolines which are generally described as efficient, clean, socially responsible, and automotively necessary. Ford Mustangs are pictured on spotless ocean beaches, the Austin America is the "perfect second car," and Mobil detergent gasoline "cleans up what other gasolines make dirty."

The truth, as you surely must know, is that rather than offering clean rides by the seashore, automobiles are befouling urban air; and Mobil detergent gasoline is about as clean as cyclamates are dietetic—it keeps the engine fresh while poisoning the air. The irony is that the bulk of WNBC-TV automobile and gasoline advertising is devoted to the biggest polluters of all—lead high-test gasolines and automobiles with large-displacement engines.

Lead in gasoline increases particulate pollution, prevents development of less polluting engines, negates available pollution-control technology like catalytic mufflers, and poses a special and significant health hazard. Large-displacement engines, while being unnecessary for most uses, simply pollute more air; because of their high power output most require high-test gasoline (with the disadvantages of lead

outlined above) and significantly increase the generation of nitrogen oxides for which control technology is generally lacking.

It is my understanding that under the Federal Communications Commission's doctrine [29 Fed. Reg. 10405-427 (1964); [47] U.S.C. 315] WNBC-TV is obliged to present the other (non-auto, non-gasoline) side of this issue. Our Washington counsel at the Center for Law and Social Policy advises us that the auto and gasoline pollution issue falls within the scope of the decisions of the Federal Communications Commission and the U.S. Court of Appeals on cigarette advertising. The Court of Appeals in *Banzhaf v. FCC* 405 F.2d 1082 (D.C. Cir. 1968) upheld the FCC's decision since "whatever it may mean . . . we think the 'public interest' indisputably includes the public health."

The Court then noted the factors which made the matter of cigarette advertising a proper one for the application of the fairness doctrine. The danger posed by cigarettes, it said, (1) is a danger to life itself, (2) is inherent in the normal use of the product and not merely associated with its abuse or dependent on intervening fortuitous events, (3) threatens a substantial portion of the population, not just a particularly susceptible fringe group; and (4) is documented by a compelling cumulation of substantial evidence. In addition, the Court pointed out that the Commission expressly refused to rely on any scientific expertise of its own, and instead, it took the word of the Surgeon General's Advisory Committee.

All of these elements are present in the case of automobile and gasoline pollution. The normal use of the product presents a danger to the life of a substantial portion of the population. This danger has been overwhelmingly documented in dozens of private and governmental reports, including a report by the Surgeon General. In his 1962 report on "Motor Vehicles, Air Pollution and Health," the Surgeon General concluded:

... on the basis of the studies thus far conducted, it is evident that components of automobile emissions produce biological effects. These include eye irritation in people, changes in pulmonary function, and reduction of spontaneous activity in animals, as well as damage to vegetation.

In addition, available statistical evidence also suggests possible relationships between illness and photochemical smog. There is for example, a strong statistical association between air pollution and emphysema and there are indications that the clinical status of this disease is affected by photochemical pollution. The rising death rate ascribed to emphysema is a matter of real concern. Furthermore, the evidence with respect to the production of lung cancers is such as to require further study as expeditiously as feasible.

The results of research conducted to date have provided evidence of a qualitative nature that automobile emissions do produce effects on human beings and other biological systems

More recent studies have produced even more dramatic evidence of the dangerous effects of automobile pollution. Among the most important of these is the report prepared for the NAS and NAE on the "Effects of Chronic Exposure to Low Levels of Carbon Monoxide on Human Health, Behavior, and Performance," published late last year by the National Academy of Science and National Academy of Engineering.

Automobile pollution represents precisely the kind of public controversy to which the fairness doctrine traditionally has applied. On one side are the conservation groups, government officials, and health professionals. They have passed legislation setting auto emission standards, introduced legislation to eliminate gasoline-powered automobiles and even sought means to decrease absolutely the American automobile population. On the other side are the automobile manufacturers and oil companies. In 1968 they spent

over \$417 million on advertising (\$284 million of it on television advertising) trying to promote the notion that cars and high-test gasoline are an absolute social and economic necessity, and implying that automobiles are clean and getting cleaner.

As Mayor Lindsay's Task Force on Air Pollution pointed out in its report of October 28, 1969:

The best way to cut down on dangerous hydrocarbons in the air is to cut down on horsepower. Yet Detroit continues to glamorize and sell engines far more powerful than are functionally necessary or consistent with individual and public safety.

In my view, neither the commercial advertisements nor the occasional clean air spots which are run by WNBC-TV do anything to remedy this propagandistic imbalance. The commercial advertisements which allude to auto pollution are designed to leave the impression that the companies are doing everything possible and necessary to remedy the problem. The clean air commercials oppose air pollution generally, but do not join in the debate about horsepower, automotive design, or the automobile's proper role in an urban environment.

On behalf of myself, as a New York resident whose health and happiness has been affected by automobile pollution, I request that WNBC-TV promptly make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy. As an officer of the Friends of the Earth, I am authorized to tell you that, while we could not afford to purchase television time, my organization would be delighted to produce spot advertisements presenting the anti-auto-pollution case. I have no doubt that other conservation and anti-pollution organizations, like the Sierra Club or Citizens for Clean Air, and organizations devoted to the prevention of respiratory diseases or cancer, like the tuberculosis and health associations or the American Cancer Society, would also be willing to produce such spots.

App. 15

If by February 20 I have not received a satisfactory answer to my request, I shall make a formal complaint to the Broadcast Bureau of the Federal Communications Commission. I am forwarding a copy of this letter to them as well as to others who should be interested in this subject.

While most of the automobile and gasoline advertising broadcast by WNBC-TV contributes to the one-sided and misleading situation described above as in violation of the fairness doctrine, I refer you to the following specific commercial messages, selected at random, all broadcast over WNBC-TV, Channel 4, in recent weeks (times and durations are approximate): (1) January 26, 1970, 8:15 p.m., 30 sec., an advertisement for Ford Mustang, picturing the car on a lonely beach, and stressing its "performance" (large engine displacement); (2) same date, 8:45 p.m., 30 sec., an advertisement for Ford Torino stressing size; (3) January 22, 1970, 6:51 p.m., 30 Sec., an advertisement for Chevrolet Impala stressing the great value of its size ("you don't have to be a big spender to be a big rider"), including the standard 250-horsepower V-8 engine; (4) January 5, 1970, 8:05 p.m., 30 sec., an advertisement for Ford Mustang and Torino GT, again stressing size ("4-barrel, V-8" and "up to 429 cubic inches") and advocating "moving up to" a larger car; (5) December 10, 1969, 11:15 p.m., encouraging the use of high-test leaded gasoline for cold-weather starting ("*the* cold-weather gasoline"). All of these ads implied that the good life is somehow inexorably connected with the use of powerful cars with large-displacement engines and high-test leaded gasoline.

Sincerely,

/s/ Gary A. Soucie
Executive Director

cc: Broadcast Bureau, Federal Communications Commission (Certified Mail Return Receipt Requested)

Mr. James D. Bramen, Assistant Secretary of Transportation for Environment and Urban Systems

App. 16

Mr. Dean Burch, Chairman, Federal Communications Commission

Mr. Norman Cousins, Chairman, Mayor's Task Force on Air Pollution

Dr. Lee A. DuBridge, Executive Director, President's Council on Environmental Quality

Dr. Roger O. Egeberg, Assistant Secretary of Health, Education, and Welfare for Health and Scientific Affairs

Dr. Merrill Eisenbud, Administrator, NYC Environmental Protection Administration

Secretary Robert H. Finch, Chairman, President's Air Quality Advisory Board

Mr. Jerome Kretchmer, Administrator-designate, NYC Environmental Protection Administration

Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration

Judge Russell E. Train, Chairman, Council on Environmental Quality

App. 17

WNBC-TV
NBC OWNED STATIONS,
A DIVISION OF NATIONAL
BROADCASTING COMPANY, INC.
THIRTY ROCKEFELLER PLAZA,
NEW YORK, N.Y. 10020

February 18, 1970

WESTON J. HARRIS
Station Manager

Mr. Gary A. Soucie
Executive Director
Friends Of The Earth
30 East 42 Street
New York, New York 10017

Dear Mr. Soucie:

This is to reply to your letter of February 6, 1970, concerning WNBC-TV's coverage of automobile pollution in which you offer to provide WNBC-TV with announcements presenting the anti-pollution case. You state, in essence, that the mere advertising of automobiles and gasolines, and particularly large-engine automobiles and high-test gasolines, constitutes a "discussion" of the automobile pollution issue.

In your letter you also state that you have been advised that "the auto and gasoline pollution issue falls within the scope of the decisions of the Federal Communications Commission and the U.S. Court of Appeals on cigarette advertising." However, we wish to point out to you that the Federal Communications Commission in its decisions on the cigarette issue specifically stressed that its ruling was "limited to this product-cigarettes," and discussed at length the effects of its ruling on the advertising of products other than cigarettes such as automobiles, food with high cholesterol count, alcoholic beverages, flouride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and common table salt.

The Commission said:

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

The products to which petitioners refer do not present a comparable situation. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from "normal use" of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the "normal use" of any other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obli-

gation upon petitioners with respect to other product advertising.

It is obvious that the Federal Communications Commission had in mind advertising for products such as automobiles when it limited the application of the Fairness Doctrine to cigarette advertising.

It should also be noted that there is little, if any, controversy that transportation by automobile should continue. The advertising of automobiles cannot therefore be a discussion of the anti-pollution issue. References in advertisements to "performance" or "size" of automobiles or to gasolines being good for "cold weather" are not, in our opinion, a discussion of a pollution problem.

Please be assured that it is WNBC-TV's policy to present contrasting views on all controversial issues of public importance on which it has presented any view. WNBC-TV accomplishes this in formats and with speakers of its own choice, since, aside from matters of personal attack, no individual or organization as such has the right to the use of a broadcaster's facilities under the Fairness Doctrine of the Federal Communications Commission.

The issue of air pollution, including the causes and effects of automobile emissions, has been extensively covered by WNBC-TV, and we believe that this coverage has more than fulfilled our obligations under the Fairness Doctrine. For example, an incomplete check of our most recent programming shows that air pollution was covered on the following programs: November 16, 1969, "The Slow Guillotine" (a special program almost entirely devoted to automobile pollution); November 24, 25 and 26, 1969, "For Women Only" (panel discussion of various aspects of air pollution, including automobile pollution); January 3, 1970, "The Huntley-Brinkley Report" (Senator Muskie and the Chairman of Consolidated Edison discussed pollution, including whether people would be willing to ride in small cars); and February 11, 1970, "The Huntley-Brinkley Report" (Automobile pollution in Milan, Italy). You can expect that we will continue

App. 20

to broadcast programming dealing with the pollution problem.

On the basis of the foregoing, we are of the opinion that there is no necessity under the Fairness Doctrine for us to broadcast the announcements you suggest.

Very truly yours,
/s/ Weston J. Harris

CENTER FOR LAW AND SOCIAL POLICY
2008 Hillyer Place, N.W.,
Washington, D.C. 20009

March 22, 1970

HAND DELIVERED

Honorable Dean Burch
Chairman
Federal Communications Commission
Washington, D.C.

Dear Chairman Burch:

In his March 14, 1970 complaint to you, against WNBC-TV in New York, Gary Soucie, Executive Director of the Friends of the Earth, referred to two documents which he indicated were enclosed. These documents were inadvertently omitted from the complaint, and a subsequent letter including the missing enclosures has been held up as a result of the mail strike. Mr. Soucie has asked me, therefore, to deliver copies of the missing enclosures and a copy of his March 14 letter.

Mr. Souci thought you might also be interested in the following item from the March 20, 1970 *New York Times* which indicates that radio and television stations will now be providing *free* air time for automobile advertising:

"The radio boys and the TV crowd are proving once again that they are not fair-weather friends. Car makers, who are the No. 1 advertising category in radio and sixth in TV, are now facing sagging sales. They are about to get a free shot in the arm from their dear, good friends in broadcast.

"The Radio Advertising Bureau and the Television Bureau of Advertising will be pushing their member stations to use spots with the theme, 'It's a good day to buy a car,' created by Campbell-Ewald, the Chevrolet agency.

"This is not the first such free promotion. The R.A.B. recalls a similar effort in 1958 to the tune of 'you ought to buy now.' It's wonderful how some guys help their friends."

Sincerely,

/s/ Geoffrey Cowan

Enclosures

cc: Mr. Gary Soucie
Executive Director
The Friends of the Earth
Commissioner Robert T. Bartley
Commissioner Kenneth A. Cox
Commissioner Nicholas Johnson
Commissioner H. Rex Lee
Commissioner Robert E. Lee
Commissioner Robert Wells
Mr. George Smith, Chief, Broadcast Bureau
Mr. Henry Geller, General Counsel
Mr. William B. Ray, Chief, Complaints & Compliance
Division
Mr. Robert J. Rawson, Chief, Renewal and Transfer
Division

App. 22

Charles R. Halpern - James W. Moorman - Bruce J. Terris
ATTORNEYS AT LAW
Center for Law and Social Policy
2008 Hillyer Place, N.W.
Washington, D.C. 20009

April 7, 1970

Mr. Dean Burch
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Chairman:

Please consider this letter a supplement to the complaint against WNBC-TV which was sent to your office by Mr. Gary Soucie on March 14, 1970. I am serving Mr. Soucie and Friends of the Earth as counsel in this matter.

Mr. Soucie's complaint involves advertising for products which cause automobile air pollution. It is grounded on the Commission's fairness doctrine and the "public interest" provisions of the Federal Communications Act relied on by the Commission in its Memorandum and Order on the "Applicability of the Fairness Doctrine to Cigarette Advertising," 9 F.C.C. 2d 921 (1967), and by the Court of Appeals in *Banzhaf v. F.C.C.*, 405 F.2d 1082 (1968). In this letter I wish to draw the Commission's attention to the ways in which the recently passed National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852, (NEPA) requires that the Commission interpret the applicable provisions of the Federal Communications Act.

In enacting NEPA, Congress emphasized the "critical importance of restoring and maintaining environmental quality." § 101(a). The Act requires that government agencies "use all practicable means and measures . . . to the end that the nation may . . . preserve" the "natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." § 101 (a) and (b). Furthermore, NEPA states

that Congress "authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." § 102.

Congress intended that NEPA's environmental policy be followed by *all* Federal officials and agencies. In its report, the Senate Committee which held hearings on the Act stated that NEPA "would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. *This would be true of the licensing functions of independent agencies as well as the ongoing activities of regular Federal agencies.*" Senate Report 91-296 (91st Cong., 1st sess. page 14) [emphasis added].*

The Commission should be especially mindful of NEPA's mandate in interpreting the meaning of the "public interest" requirements of the Communications Act. As the Commission and the courts have emphasized in the past, the crucial question which the Commission must resolve in dealing with a complaint like Mr. Soucie's is the meaning of the "public interest." In explaining the legislative authority for the Commission's cigarette decision, the court said:

"The ruling originated in response to a 'fairness doctrine complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it 'clearly has the authority to make this public interest ruling' under the public interest standard of the Communications Act and relied upon 'the licensee's statutory obligation to operate in the public interest.' [Cigarette Advertising, *supra*, 9

* We invite your attention to the first case which, to our knowledge, has applied the National Environmental Policy Act: *Texas Committee on Natural Resources v. U.S.* (Civ. Act., No. A-69-CA-119), Feb. 5, 1970, W.D. Tex.). In that case, the Court observed that the Federal Housing Administration was bound to apply the Act. A copy of the decision is attached.

F.C.C. 2d, 921 at 927.] . . . [W]hether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same." 405 F.2d 1082 at 1091, 1092.

The Court went on to look for some standards which would limit the Commission's discretion in defining "the public interest." It specifically argued that Congress, in adopting the Act, intended the "public interest" to include the public health.

"[T]he 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards We cannot uphold [the ruling] merely on the ground that it may reasonably be thought to serve the public interest.

"Whatever else it may mean, however, we think the public interest indisputably includes the public health. There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. The power to protect the public health lies at the heart of the states' police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

The Radio Commission, predecessor to the FCC, assumed with judicial approval and without question that broadcasting of specious medical information was not in the public interest. In the Communications Act of 1934, Congress transferred the Radio Commission's authority to license in the 'public interest, convenience and necessity' to the FCC which has also ruled specific controversial health claims to be not in the public interest. Given the

premise that the 'public interest' may include some of the content as well as the technical quality of broadcasting, we are satisfied that it includes the public health. But were there any initial doubt, in the absence of evidence to the contrary we think Congress must be deemed to have acquiesced in the determinations to that effect of both Commissions on a matter of such basic and universally recognized importance." 405 F.2d 1082 at 1096, 1097.

Congress has now made it clear that the "public interest" also embraces the policies set forth in NEPA. One of the most urgent policy matters embodied in NEPA is the elimination of air pollution—most of which comes from automobiles. A stated purpose of the Act is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . ." § 2, National Environmental Policy Act. Specifically, the Senate Interior Committee, in describing the purposes of Title I of NEPA, stated: "Examples of the rising public concern over the manner in which Federal policies and activities have contributed to environmental decay and degradation may be seen in . . . rising levels of air pollution" (Senate Report 91-296, page 8). Mr. Soucie's complaint cites some of the most important government and private scientific studies which describe the ways in which automobile pollution destroys the nation's health and environment.

Consequently, NEPA requires that the Commission respond to Mr. Soucie's complaint with at least as strong a ruling as was issued in the cigarette case. The Act declares that "it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony." § 101(a), National Environmental Policy Act. Furthermore, the Act places responsibility upon all agencies and officials of the Federal Government "to use all practicable means . . . to improve and

coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- “(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;” § 101(b), NEPA.

The television set touches the lives of our people with a greater impact than any other product of technology except, perhaps, the automobile. The use of television is an indispensable component of any public issue of the magnitude of air pollution. Those most closely acquainted with the air pollution problem do not believe it can be solved until new legislation is passed or the public is persuaded to abandon pollution generating products. Because those who have the strongest interest in the present internal combustion engine advertise their products artfully and frequently on television, the only way the public may be reached and the problem solved is through an application of the public interest standard to this problem. The fairness doctrine and other standards developed to meet the public interest requirements of the Communications Act are clearly among the “policies” that Congress directed “shall be interpreted and administered in accordance with the policies set forth in” NEPA.

App. 27

In view of the National Environmental Policy Act, it is the Commission's clear obligation to uphold Mr. Soucie's complaint and take appropriate action to bring WNBC-TV into compliance with the requirements of the Federal Communications Act.

Sincerely,

/s/ James W. Moorman

Attorney for
Mr. Gary Soucie and
Friends of the Earth

THE CITY OF NEW YORK
ENVIRONMENTAL PROTECTION ADMINISTRATION
2358 Municipal Building, New York, N.Y. 10007

June 20, 1970

Dean Burch, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Chairman:

As the Environmental Protection Administrator of the City of New York, I am writing to express strong support for the position taken by the Friends of the Earth in its March 14, 1970 complaint against WNBC-TV: namely, that the Commission's "fairness doctrine" and a licensee's "public interest" responsibilities should properly be construed to require free time for reply to automobile and gasoline advertisements on television. The purpose of this letter is to confirm that a recognition of the controversial nature of most automobile and gasoline advertising is not limited to a "vocal minority";* concern over the threat such adver-

*See Memorandum Opinion and Order, the "Applicability of the Fairness Doctrine to Cigarette Advertising" 9 F.C.C.2d 921, 943 (1967), *aff'd*, *Banzhof v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968).

tising represents to the public health is shared by many governmental organizations and specifically by the City of New York.

It is my considered judgment that normal use of the automobile and gasolines most widely advertised constitutes a substantial threat to the health and lives of millions of Americans, especially those living in congested municipalities. The extent and seriousness of this problem is generally acknowledged by leading scientists and by public and private organizations with expertise in the areas of health and pollution, and is reflected in the extremely high priority which the President and Congress of the United States have accorded to solving the problem of air pollution generally and automobile pollution in particular. I am advised by counsel that under such circumstances, the standards enunciated by the Commission in determining that the fairness doctrine applies to cigarette advertising (Memorandum Opinion and Order, 9 F.C.C.2d 921 (1967), *aff'd*, *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968)) also require licensees to make available a reasonable amount of free time to responsible persons or groups for statements designed to counter the impression presented in commercial advertising that use of automobiles and gasolines contributes to the good and healthy life without causing the adverse effects on health actually known to occur.

The purpose of this letter is to set forth what in my view are compelling reasons for the adoption by the Commission of a general rule requiring availability of free television time to rebut automobile and gasoline advertisements. I have not dealt with the question whether WNBC-TV has allocated a sufficient amount of time to those who would highlight the dangers of automobile and gasoline pollution to satisfy the "fairness doctrine" and WNBC-TV "public interest" responsibilities. Prior to a determination of that question, however, the Environmental Protection Administration would like the opportunity to review WNBC-TV's programming in this regard and if appropriate present its views to the Commission.

I. *The Interest of New York City in the Application of the Fairness Doctrine to Automobile and Gasoline Advertising.*

Successful treatment of the New York City air pollution problem is essential if the City is to protect the health of its citizens and thrive economically. The Public Health Service has expressed serious concern with respect to the quality of New York City's air. See August 4, 1967 United States Public Health Service for Air Pollution Control Report. Doctors in Los Angeles advise more than 10,000 people annually to leave the City because of the threat which air pollution represents to their health (See Washington Post, January 26, 1969, p. B-3), an indication of the dimension of the air pollution crisis confronting major municipalities throughout the country.

In New York City automobiles are the chief offenders, as they are throughout the United States.* Automobiles contribute over 60% of the total pollution in the New York City air, and the percentage is far higher in many areas of the City where automobile traffic is highly concentrated.

Automobiles are responsible for most of the 1.5 million tons of the potentially lethal carbon monoxide dispersed each year in the New York atmosphere. See Scientists Committee for Public Information, Inc., *Air Pollution in the Queens, Midtown and Brooklyn-Battery Tunnels*. Whereas levels of 10 ppm (parts per million) for an eight-hour period is the standard set by the Federal Government as the threshold for adverse health effects (See United States Public Health Service, *Air Quality Criteria for Carbon Monoxide*

*See generally "The Automobile and Air Pollution: A Program for Progress (Part II)," United States Department of Commerce (December 1967); "Sources of Air Pollution and Their Control," United States Department of Health, Education and Welfare, Public Health Service (1966); Air Pollution - Present and Future, City of Livermore Air Pollution Control Study Committee (March, 1968); "Search for a Low Emission Vehicle," Staff Report for Committee on Commerce, United States Senate, p. 2 (1969).

(1970)), reports have been received of carbon monoxide average concentrations of 70 ppm in central Manhattan traffic (New York City Department of Air Pollution Control, *Carbon Monoxide and Air Pollution from Automobile Emissions in New York City*, p. 2 (1967)), and well over 100 ppm during periods of peak congestion at certain bridges and tunnels. See *Report on Carbon Monoxide Instrumentation in the Tunnels of the Triborough Bridge and Tunnel Authority*, p. 15 (November, 1969). In addition, automobiles emit 569 tons of hydrocarbons and 106 tons of oxides of nitrogen daily (New York City Department of Air Resources, *Carbon Monoxide and Air Pollution from Automobile Emissions in New York City*, p. 2 (1967) as well as large amounts of particulate matter, oxidants, ozone, and an undetermined amounts of asbestos. Most gasolines are leaded, resulting in additional toxic emissions. The deleterious effects of this barrage of pollutants are discussed below in Section II of this letter.

The 1969 supplement to the *Mayor's Task Force on Air Pollution* reported that the two million automobiles operating in New York City—more than half of them in Manhattan—were twice as many as the area should sustain. It further warned that “pollution from automobiles and trucks has been steadily increasing and has cut into the other gains scored in the war against environmental poisoning.” *Supplement to 1966 Report of the Mayor's Task Force on Air Pollution*, p. 6 (October, 1969).

To begin to meet the automobile pollution emergency a number of approaches must be identified and explored on both a local and national basis. The automobile industry must be urged to develop a cleaner internal combustion engine, improved anti-pollution devices, and alternatives to the internal combustion engine itself. Private and governmental organizations should fund efforts by groups independent of the automobile and gasoline industry to develop pollution-free cars, safer gasolines and improved anti-pollution devices. The Environmental Protection Administration will shortly

propose regulations prohibiting the sale of leaded gasoline in New York City, and such prohibition should be urged throughout the country. Purchase of smaller engined automobiles and curtailment of the unnecessary use and purchase of cars should be encouraged. The elimination of traffic from central City streets should also be investigated, and New York City is presently thinking about an expansion of its "Earth Day" experiment blocking traffic from certain major shopping thoroughfares. Shifting emphasis and funds from state and federal highway programs to mass transportation project is essential.

The exploration and implementation of such programs cannot occur on a meaningful scale absent a profound public concern. This concern is not likely to come about unless the advocates of stringent anti-pollution measures are given sufficient access to the media. The New York City government needs local public support for its local efforts at pollution abatement, but basic anti-pollution improvements in automobiles and gasoline require efforts on a national level by industry, the Federal Government, and private organizations. Consequently, the City has a deep interest in the requested interpretation of the "fairness doctrine" in that nationwide access to television for anti-pollution comment will generate public interest in and support for national activity essential to solving New York City's problems as pollution problems in other parts of the country.

II. *The "Fairness Doctrine" and the "Public Interest" Responsibilities of Licensees Require Allocation of Free Television Time for Reply to Automobile and Gasoline Advertisements which Encourage Purchase of Products Designated by the Federal Government and by Expert Public and Private Organizations as a Threat to Health*

In its Memorandum Opinion and Order on "The Applicability of the Fairness Doctrine to Cigarette Advertising," 9 F.C.C. 2d 921 (1967), *aff'd*, *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968), the Commission held that under the

"fairness doctrine," television stations which regularly present advertisements which portray smoking as a desirable habit must make a reasonable amount of free time available for comment by responsible persons or groups on the hazards of smoking. The "frequency of the presentation of the one side and the nature of the potential hazard to the public" was held to require "presentation of the opposing viewpoint on a regular basis (e.g., each week)." 9 F.C.C. 2d at 941.

The Commission defined the "key factors" in its decision as:

"(1) Governmental and private reports and congressional action with respect to cigarettes, and (2) their assertion in common that normal use of this product can be a hazard to the health of millions of persons." 9 F.C.C. 2d at 943.

Both these factors are present with respect to automobiles and gasoline.

Recent acts and statements by the United States Congress and the President of the United States accord a priority to abatement of air pollution—and especially pollution from automobiles—which is virtually unprecedented in its recognition of a particular health hazard as a menace to the American public as a whole. Thus in his State of the Union Message, January 22, 1970, President Nixon declared that treatment of pollution of the environment "has become a common cause of all the people of America" and identified the automobile as "the worst polluter of the air."

Like cigarettes, therefore, the threat which automobile pollution represents to health is commonly recognized by both governmental and private experts. The most publicized toxin emitted from automobiles is carbon monoxide, which by interfering with the capacity of the blood to transport and release oxygen to the tissues of the body impairs a driver's vision and psychomotor performance. "The Search for a Low Emission Vehicle," Staff Report for the Committee on Commerce of the United States Senate, p. 3 (1969).

Other effects of carbon monoxide on judgment and body functions have been observed, including headaches and impaired performance on simple psychological and arithmetic tests at 100 ppm and an impaired sense of time at 50 ppm and below. A serious possibility exists that continuous exposure to low levels of carbon monoxide may increase chances of heart disease, strokes, and other vascular conditions. See generally, Scientists' Committee for Public Information, Inc., *Air Pollution in the Queens-Midtown and Brooklyn-Battery Tunnels*.

Other pollutants from automobiles are hydrocarbons, lead, and oxidants:

"Some hydrocarbons interact with oxides of nitrogen in sunlight, producing odorous smog, eye irritation, and vegetation damage.

Nitrogen dioxide, one of the oxides of nitrogen, is directly toxic to man and animals. The gas is mildly irritant and may be deeply inhaled. Death and chronic respiratory diseases have resulted from exposure to nitrogen dioxide; and pulmonary damage in animals has occurred with concentrations of less than 5 parts per million. In addition to its toxic effect on man, nitrogen dioxide is responsible for most of the atmospheric coloration problems, and in the Los Angeles area alone plant damage caused by nitrogen dioxide is estimated to be between \$6 million and \$10 million per year.

Although there is a dearth of knowledge about atmospheric lead inhalation, the toxic effects of ingested lead are well known. Lead poisoning can attack the central nervous system, peripheral nerves, smooth muscle, and reproductive organs. Current recommendations call for a 10-percent reduction of lead content per year in order to assure reduction of the public health hazard of atmospheric lead compounds.

The final major vehicular pollutants, oxidants and ozone, are irritating to exposed mucous membranes.

Eye and respiratory irritation has occurred in sensitive subjects at oxidant levels as low as 0.1 to 0.15 parts per million." "The Search for a Low Emission Vehicle," Staff Report for the Committee on Commerce of the Senate, p. 3 (1969) (Footnote references omitted).

The United States Air Quality Act, 42 U.S.C. 1857 deals specifically with air pollution, and expressly finds that

"the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare" Sec. 101(a)(2).

The Act provides for research and development relating to fuels and vehicles (Sec. 104), and for the development and enforcement of national emission standards for motor vehicles (Secs. 201-212)

The National Air Pollution Control Administration has recognized the danger to public health from automobile air pollution, and has issued air quality criteria for carbon monoxide, hydrocarbons and particulate matter. It has also issued criteria on photochemical oxidants which result indirectly from automobile pollution and figure importantly in life endangering smog.

The similarity of danger from cigarettes and the evils of automobile pollution is underscored by evidence that air pollution generally, and automobile pollution in particular, has a particularly detrimental health effect on smokers. See, e.g., National Tuberculosis and Respiratory Disease Association, *Pollution Primer*, pp. 71-72 (1969); Scientists' Committee for Public Information, Inc., *Air Pollution in the Queens-Midtown and Brooklyn-Battery Tunnels*.

Indeed, un rebutted automobile advertising constitutes a more serious invasion of the public's right to disclosure of health hazards than does cigarette advertising, in that direct physical injury from cigarettes is limited to those members of the public who choose to smoke. Automobile pollution

affects the health of all members of the public whether or not they use automobiles.

Federal policy includes both the development and dissemination of information concerning pollution (See, e.g., Air Quality Act, Secs. 103-104; Environmental Quality Improvement Act of 1970, Tit. II of H.R. 4148, 91st Cong., Approved April 3, 1970, Sec. 203(d)(4); Executive Order 11514, Secs. 2 and 3) and encouragement of efforts by members of the public to confront the problem, a policy which presupposes a public which is knowledgeable on the pollution issue. See, e.g., National Environmental Policy Act, Sec. 101(c): "each person has a responsibility to contribute to the preservation and enhancement of the environment." See also Executive Order 11514, Sec. 2(b). The analogy to the Federal policy of disseminating information on cigarettes, which played a part in the Commission's application of the "fairness doctrine" to cigarettes is clear. See 9 F.C.C. 2d at 933.

Congress has Declared the Elimination of Environmental Pollution a Public Policy of Unique Importance.

In the National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852:

"The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government to use all practicable means and measures in a manner calculated . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Sec. 101(a).

Congress further recognizes that:

"each person should enjoy a healthful environment and that each person has a responsibility to contri-

bute to the preservation and enhancement of the environment." Sec. 101(c).

The importance of this policy is illustrated by the Act's mandate that:

"to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." Sec. 102.

The Act directs all Federal agencies to study the environmental impact of their programs, policies, regulations, and statutory authority and to strive to bring them into harmony with the Act's purpose of protecting the environment. Sec. 102. In addition, the Act creates a Council on Environmental Quality which will try to assure that the various activities of the Federal Government take due account of environmental considerations. Sec. 201-204. See Executive Order 11514. Additional support and machinery for the implementation of such policies are provided in the Environmental Quality Improvement Act of 1970, Tit. II of H.R. 4148, 91st Cong., Approved April 3, 1970.

Thus, recognition by Congress and the President of the existence of a major public health hazard and the priority they have accorded to dealing with that hazard is, if anything, more clear and dramatic in the case of environmental pollution than it was in the case of cigarettes. Indeed, the requirement of the National Environmental Policy Act that all Federal agencies construe their policies, regulations, and authorizing statutes for consistency with the purposes of the Act indicates that any doubt whether the "fairness doctrine" applies to automobile and gasoline advertising should be resolved in favor of coverage.

Parenthetically, while I have thus far emphasized "automobile pollution" as such, no meaningful distinction can be made between the threat to health represented by automobile and gasoline advertising in applying the "fairness doctrine" and defining a licensee's public interest responsibility. Whereas automobiles fail to protect against pollution from combustion of fuels, the fuels themselves contain lead and

other toxic elements. I am informed by experts within the New York City Department of Air Resources that the addition of certain additives to gasoline can reduce the emission of common pollutants, and research is currently underway to determine whether such additives give rise to other types of pollution.

Moreover, gasoline commercials inescapably advertise and encourage the purchase and use of automobiles. A basic thrust of gasoline advertising is to suggest the importance and enjoyment of driving by emphasizing the need for a gasoline with qualities such as high mileage, and extra power. Gasoline advertisements typically depict driving as a pleasurable activity essential to the good life. Accordingly, in measuring the amount of time devoted to commercial advertising of automobiles, it would be misleading not to include the time allotted to gasoline commercials.

In light of the general recognition that automobile pollution constitutes a serious threat to public health, television advertisements implying that the good life requires large-engine cars and leaded gasoline are clearly controversial statements on matters of public importance. The right of citizens and representative groups to comment on and rebut such adversements, to dramatize in striking ways the danger to human health and life from automobile pollution, and to present suggestions for reducing automobile pollution is critical to the development of an informed public which can respond intelligently to the problem of automobile pollution—as noted above, one of the stated objectives of the recent Federal anti-pollution legislation. Consequently, the “fairness doctrine” requires television stations to allocate a reasonable amount of free time to counter the effect of automobile and gasoline commercials.

The danger to health from automobile pollution also requires the licensee to present regular statements on automobile and gasoline hazards in order to fulfill its obligation to serve the public interest. In its opinion affirming the cigarette ruling, the Seventh Circuit stated:

"The ruling originated in response to a 'fairness doctrine' complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it 'clearly has the authority to make this public interest ruling' under the public interest standard of the Communications Act and relied upon 'the licensee's statutory obligation to operate in the public interest.' . . . [W]hether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same." *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1091, 1092 (D.C. Cir. 1968).

It also declared that:

"Whatever else it may mean, however, we think the public interest indisputably includes the public health. There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest . . . The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends" 405 F.2d at 1096-97.

Thus, a concern central to both the "fairness doctrine" and "public interest" rulings in the cigarette decision is the licensee's responsibility not to be used in a way that jeopardizes public health. In its cigarette decision the Commission emphasized that where statements creating a possible danger to health—as opposed to other types of statements having public importance—are made on television, the licensee is under an especially high duty to inform the public about the hazard involved:

"Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death. *In the circumstances, we think that the licensee is under a higher duty than*

in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in paragraph 33-34 and 60-61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (e.g., each week)." 9 F.C.C. 2d at 941 (emphasis added).

The menace to health which has arisen from the ordinary use of automobiles and gasoline and the major role of these products in creating the air pollution crisis which presently threatens the habitability of major cities in this country are clear. I respectfully submit that the same reasoning which required application of the "fairness" and "public interest" doctrines to cigarette advertising requires their application to advertising of automobiles and gasoline.

Very truly yours,

/s/ JEROME KRETCHMER
Administrator

JK:amw

cc: Commissioner Robert T. Bartley
Commissioner Kenneth A. Cox
Commissioner Nicholas Johnson
Commissioner H. Rex Lee
Commissioner Robert E. Lee
Commissioner Robert Wells

Mr. George Smith, Chief, Broadcast Bureau
Mr. Henry Geller, General Counsel
Mr. William B. Ray, Chief, Complaints and Compliance Division
Mr. Robert J. Rawson, Chief, Renewal and Transfer Division
Mr. Weston J. Harris, Station Manager, WNBC-TV
Mr. Gary A. Soucie, Executive Director, Friends of the Earth

App. 40

CITIZENS FOR CLEAN AIR, INC.
502 Park Avenue
New York City 10022
212-935-1454

June 23, 1970

Mr. Dean Burch, Chairman
Federal Communications
Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Complaint of Friends of the Earth
against WNBC-TV

Dear Mr. Chairman:

The enclosed letter was sent to you in the form of a
Western Union night letter on June 23, 1970.

Very truly yours,
CITIZENS FOR CLEAN AIR, INC.

By _____
Barry D. Rein
Vice President

cc: Secretary, Federal Communications
Commission

June 22, 1970

Mr. Dean Burch, Chairman
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

Re: Complaint of Friends
of the Earth against
WNBC-TV

Dear Mr. Chairman:

Citizens for Clean Air, Inc. (hereinafter called "CCA") joins and supports Friends of the Earth in its complaint against WNBC-TV for the latter's failure to fulfill its obligations under the fairness doctrine and "public interest" with respect to automobile and gasoline advertisements.

CCA is a tax-exempt New York membership corporation organized in 1965 for the purpose of educating the public—and particularly residents of the Greater New York metropolitan area—to the hazards of air pollution and to effective means of alleviating it. Our thousands of members in the New York community have demonstrated by their participation in this organization a deep concern over the serious health hazard posed by the air that we breathe, as well as an educated awareness of the important sources of this sea of pollution. It has become irrefutably clear to our membership that the automobile is such a source.

The primacy of the automobile among local pollutant sources is revealed by a recent report to the New York City Council by the Yale Legislative Service entitled "The Control of Automotive Air Pollution in New York City". According to this report, the automobile is responsible for 60% of the adulterants in New York City's air, a figure 2.7 times greater than its closest competitor. Specifically, the automobile emits into New York City's atmosphere's hydrocarbon content, 17.3% of its oxides of nitrogen, the great majority of lead compounds and, as a derivative of the hydrocarbons and oxides of nitrogen, a great proportion of the oxidants we are forced to inhale.

The implications of these statistics for public health in this city are alarming. Carbon monoxide combines with hemoglobin in the blood in much the same way as oxygen, impairing the blood's ability to carry oxygen to the tissues. It is also believed that carbon monoxide causes arterial and heart tissue damage in adults and hinders the development of unborn children. Hydrocarbons are suspected carcinogenic agents. They also cause eye irritation and damage to

vegetable life. Oxides of nitrogen can cause bronchical and pulmonary damage and in some cases, death. Ingested lead disrupts the central nervous system, peripheral nerves, smooth muscles and reproductive organs. It has also been shown to cause brain damage. Recent studies indicate a substantial possibility that continuous inhalation of lead can also cause health problems. Finally, oxidants cause irritation of the eyes, can limit the athletic prowess of school children and are known to make breathing a more laborious task for those with certain lung conditions. In some instances, death follows. It is all too clear that the automobile, as the producer of these harmful compounds, is a menace to the health and lives of those living in the New York metropolitan area. It is also clear that automotive pollution has stirred a controversy of the type to which the fairness doctrine has traditionally been applied. On one side are civil anti-pollution groups such as CCA, elected officials and health officers who seek to establish a ceiling on the emission of automotive wastes in the atmosphere. An important and direct method of so limiting wastes is the imposition of limitations on the purchase and use of automobiles in the metropolitan area. On the other side, automobile manufacturers and dealers as well as oil companies spend large sums annually to boost car sales, to sell engines of ever larger displacement and to maintain lenient waste emission standards.

One facet of this controversy has been debate over the banning of automobiles from Manhattan. The Yale report urges that this possibility be studied and that consideration be given to prohibiting automobiles from central Manhattan. Such a limitation on the use of automobiles is completely antithetical to the arguments of those urging increasingly greater use of ever larger automobiles—exactly the factors which may necessitate such a prohibition.

As residents of New York, it is clear to us that we are receiving an effective presentation of only one side of this controversy. We strongly urge the Commission to require that licensees make available significant amounts of time

for presentation of the other side. CCA is currently engaged in producing radio and television messages advocating the anti-pollution position in this controversy, and we will be happy to make them available to the stations for broadcast.

If it is not as clear to the Commission as it is to us, from the facts set forth above and those contained in the exchange of correspondence between Friends of the Earth, WNBC-TV and the Commission, that the relief sought by FOE should be granted, then we urge the Commission to conduct hearings for the purpose of developing facts adequate to resolve the serious questions which have been raised.

In the event that further proceedings are held by the Commission, CCA wishes to present testimony which bears importantly on these questions. In any event, we request that CCA be included in the service list and that copies of all notices and papers issued by the Commission or required to be served by any party be sent to CCA at the address given below.

Very truly yours,

CITIZENS FOR CLEAN AIR, INC.
502 Park Avenue
New York, New York

By /s/ Barry D. Rein
Vice President

All communications to be
mailed to:

Barry D. Rein
330 Madison Avenue
New York, New York

cc: Secretary, Federal Communications
Commission

App. 44

NATIONAL BROADCASTING COMPANY, INC.
1725 K Street, N.W.
Washington, D.C. 20006
EMerson 2-4000

Howard Monderer
Washington Attorney

July 13, 1970

Honorable Ben F. Waple
Secretary
Federal Communications
Commission
Washington, D.C. 20554

Dear Mr. Waple:

In a letter to Chairman Burch of June 20, 1970, Jerome Kretchmer, Administrator of the Environmental Protection Administration of the City of New York, expressed his support for the complaint by Friends of the Earth against WNBC-TV.

As we advised Friends of the Earth, we do not regard the content of the commercials broadcast by WNBC-TV which advertise automobiles or gasolines to be a discussion of the pollution issue.

On the other hand, WNBC-TV has presented many programs and announcements which do express the anti-pollution point of view. A partial list of such programs during only the first five months of 1970 is attached hereto. In addition to these programs, news reports in which an anti-pollution viewpoint was expressed were carried on a number of occasions, and over 200 public service announcements for anti-pollution, conservation, and other related organizations in the field of ecology or environment were carried by WNBC-TV during the first 6 months of 1970.

App. 45

Surely the public has not been "left uninformed" by WNBC-TV of the anti-pollution viewpoint (see *Cullman Broadcasting Co., Inc.*, 25 RR 895 (1963)).

Respectfully yours,

Howard Monderer

cc: Jerome Kretchmer
Gary A. Soucie

Some of the programs discussing pollution broadcast
by WNBC-TV, January 1 through May 31, 1970

<u>Date</u>	<u>Program</u>	<u>Name of Guests and Other Information</u>
January 7	Today	David Siva, attorney for Sierra Club, and law student, interviewed concerning controlling pollution through the courts.
January 7	Tonight Show Starring Johnny Carson	One hour of show devoted to discussion of population and the environment with Dr. Paul Ehrlich, professor and author of "The Population Bomb."
January 20	Today	Issaac Asimov, author of "The Solar System and Back."
January 23	Today	Senator Edmund S. Muskie (D-Me.) discussed President Nixon's State of the Union address insofar as pollution was concerned.

App. 46

January 30	Today	Russell E. Train, Under Secretary of the Interior, interviewed concerning pollution.
January 30	The World of The Beaver	Special program showing the life of the beaver and discussing the problem of pollution in connection with wild life.
February 1	Man In Office	Frederick O'R. Hayes, Director of the Budget, New York City, discussed the problems of sewers and sewage disposal.
February 1	Searchlight	Jerome Kretchmer, Administrator Designate, New York City Environmental Protection Administration, was interviewed concerning various aspects of sanitation, including pollution.
February 1	Meet the Press	Senator Edmund S. Muskie (D-Me.), Chairman, Senate Subcommittee on Air and Water Pollution, was interviewed concerning environmental problems and pollution.
February 8	Man in Office	Representatives James R. Grover (R-N.Y.) and Robert Roe (D-N.J.) discussed conservation and anti-pollution legislation.
February 9	Tonight Show Starring Johnny Carson	Dr. Paul Ehrlich, author, discussed population and environment.

App. 47

February 13	NBC Science Series "Survival On The Prairie"	Special film documentary program on the continuing struggle between the needs of man, animals and the prairie, produced in association with the National Academy of Sciences.
February 22	Man In Office	H. Lee Dennison, Suffolk County Executive, discussed the pollution problem, public parks and highways.
March 1	Man In Office	Dr. Meril Eisenbud, Environmental Protection Administrator, discussed air, water and transportation pollution.
March 2	For Women Only	The entire week of March 2 (5 programs) was devoted to the subject of "pesticides." The guest panelists included Dr. Charles P. Wurster, Assistant Professor of Biological Sciences, State University of New York at Stony Brook; Dr. Wayland J. Hayes, Jr., Professor of Biochemistry, Vanderbilt University School of Medicine, and former Chief Toxicologist, Pesticides Program, National Communicable Disease Center, U.S. Public Health Service; Dr. Theodore C. Byerly, Assistant Director of Science and Education, United States Department of Agriculture; Frank Graham, Jr., author of "Since Silent Spring" and various articles on pollution and conservation; M. Taghi

Farvar, Coordinator of International Programs, Center for the Biology of Natural Systems, Washington University at St. Louis. Organizations represented in the audience, which usually participates in the discussion, included League of Women Voters, Newcomers Club of Wyckoff, New Jersey, N.E.G.R.O. (National Economic Growth and Reconstruction Organization), National Council of Jewish Women, American Association of University Women, and Ladies of Charity.

March 3	For Women Only	See description for March 2 program.
March 3	First Tuesday	Doctors Wayne Davis, Kenneth Watt and Paul Ehrlich and former Secretary of the Interior Stewart Udall discussed ecology and the probable situation of the earth in the year 2000 A.D.
March 4	For Women Only	See description for March 2 program.
March 4	Life With Linkletter	Robert H. Finch, Secretary of Health, Education and Welfare, discussed population and pollution in an interview.
March 5	For Women Only	See description for March 2 program.
March 6	For Women Only	See description for March 2 program.

March 8	NBC Religious Series, Frontiers of Faith	This program entitled "The Quality of Life-Man's World" focussed on ecological problems, including environmental pollution and the science of urban ecology.
March 20	Today	Prime Minister Pierre Trudeau in an interview in Northern Canada discussed protecting ecological balance.
March 21	Saturday Night At The Movies—"A Clear and Present Danger"	Feature film drama about a United States Senate candidate who is criticized for being more concerned with air pollution than "politics." He succeeds in awakening the town to the need for air pollution control.
April 4	Agriculture U.S.A.	This program was on "Smog-Society's Suicide."
April 7	NBC White Paper: Pollution is a Matter of Choice	Film documentary examined the technology that causes pollution and the options available to Americans to preserve our land and cities.
April 16	The Tonight Show Starring Johnny Carson	Dr. Paul Ehrlich, author, discussed the population explosion and environmental problems.
April 18	New Jersey Illustrated	This program showed "how to make a dirty river."
April 18	Community at Large	This program, entitled "Beware the Wind" primarily concerned air pollution.

App. 50

April 19	Library Lions	This program, entitled "To Clear the Air" concerned air pollution.
April 19	Man In Office	Dr. Robert Rickles, Commissioner, New York City Department of Air Resources, discussed the problems of pollution.
April 19	Speaking Freely	Russell Train, Chairman, President's Council on Environmental Quality, discussed pollution.
April 19	The Slow Guillotine	This award-winning documentary film, produced by television station KNBC, primarily concerned the problems of air pollution from automobiles.
April 20	Today	The entire week of April 20 was devoted to the problem of ecology and was entitled "New World? Or No World?". It included film reports, background information and interviews. Among the guests appearing April 20 were Dr. Paul Ehrlich, Director, Graduate Study, Department of Biological Sciences, Standord University; Dr. Roy W. Hahn, Jr., Environmental Engineering, Texas A & M University; Dr. Rene Dubos, Professor, Rockefeller University and author; Ian McHarg, founder and chairman of the Department of Landscape, Architecture and Regional Planning, University

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| April 21 | Today | <p>of Pennsylvania; Dr. Margaret Mead, Anthropologist and Curator of Ethnology at the American Museum of National History; and Reverend Ray C. Shaw, Chairman of the First National Congress on Optimum Population and Environment.</p> |
| April 22 | Today | <p>A continuation of the series on "New World? Or No World?". This program included as guests Ralph Nader in a discussion of the problems of air pollution and automobiles, as well as Robert O. Anderson, Board Chairman, Atlantic-Richfield Oil Co.; Charles Luce, Board Chairman, Consolidated Edison Co.; Dr. Barry Commoner, microbiologist-ecologist, Washington University at St. Louis; Martin Schneider, ecology "detective"; Dr. E. J. Mishan, London School of Economics; Dr. Carl Madden, U.S. Chamber of Commerce; and Dr. Robert Lekachman, State University of New York at Stony Brook, New York.</p> <p>A third in the series on "New World? Or No World?". This program included as guests Rep. Roman C. Pucinski (D-Ill.); Mayor Richard Daley of Chicago; Denis Hayes, National Coordinator, Environmental</p> |

		<p>Teach-In; Rep. Paul N. McClosky, Jr. (R-Cal.); Ed Furia, Director, Philadelphia's Earth Day events; Captain Charles Sebastian, charter boat captain from Louisiana; Dr. Lyle Stanford, Professor of Biology at the College of Idaho; John C. Bee, Jr., publisher of "Urban West" magazine; and Mayor John V. Lindsay of New York.</p>
April 22	Earth Day 1970	<p>This special 2-hour news program included both live and film coverage of "Earth Day" events in various parts of the United States. Among others who were shown on the program were Charles C. Johnson, Administrator for Consumer Protection and Environmental Health Service; Rep. Brock Adams (D-Wash.); Schell Gordon and Ron Hayes, student organizers for "Earth Day" in Philadelphia; Rep. John Brademas (D-Ind.); Senator Abraham A. Ribicoff (D-Conn.); Mayor Albert Del Santro, Donora, Pa. (where air pollution killed a number of people); Adlai Stevenson III, Secretary of State, Ill.; Cody Pranstall, lecturer, St. Albans School; Dr. Paul Ehrlich; Dr. Fred S. Singer, Deputy Associate Secretary for Scientific Programs, Water Pollution Con-</p>

		trol, Department of the Interior; and Senator Robert W. Packwood (R-Ore.).
April 23	Today	The fourth Today program of the week on ecology included among the guests Lord Robens Chairman, British National Coal Board; Lord Kennett, Junior Secretary, Ministry of Housing and Local Government; Jack Charington, President of a British major fuel supplier; and Admiral P. G. Sharp (Ret.), Director, National Society for Clean Air, all on film from London; Jeromē Kretchmer, Environmental Protection Administrator of New York City; Thomas F. Williams, Director, Public Affairs, Department of Health, Education and Welfare; Roy F. Greenaway, Administrative Assistant to Senator Alan Cranston (D-Cal.); Walter Hickel, Secretary of the Interior; Rep. Morris K. Udall (D-Ariz.); William Rusher, publisher of National Review; Senator Edmund S. Muskie (D-Me.); Dr. Russell E. Train, Chairman, President's Council on Environmental Quality.
April 23 and April 24	Editorial	WNBC-TV editorialized on the problems of pollution. The editorial was carried four times.

April 24	Today	The fifth in this week's series of programs subtitled "New World" Or No World?", this program included highlights of interviews shown on Today programs earlier in the week, and also included appearances by Roger Caras, naturalist; Stewart Udall, former Secretary of the Interior; Charles Luce, Board Chairman, Consolidated Edison Company; Dan Lufkin, Member, Earth Day Committee; Senator Gaylord Nelson (D-Wisc.); C.C. Johnson, Administrator, Consumer Protection and Environmental Earth Services; Department of Health, Education and Welfare; and Col. Frank Borman, former Astronaut.
April 26	Youth Forum	This program, subtitled "What You Should Know About Environment" had as its guest Thomas H. Stokes, Director of a group called "Environment."
May 3	In Which We Live	This program included a comprehensive report on DDT, featuring a film segment on the effects of DDT on wild life and fish and interviews with Dr. Charles Wurster and Dr. Robert Risebrough concerning contamination of Long Island; James Wright, World

App. 55

		Health Organization; and Dr. Theodore Byerly.
May 10	Speaking Freely	Robert Roses discussed ecology, among other things.
May 10	Library Lions	This program showed how parks can be used as an educational tool.
May 10	In Which We Live	This program examined earth as a whole ecosystem, and included interviews with Dr. David Gates, Director, Missouri Botannical Gardens, and Dr. Barry Commoner, Washington University at St. Louis.
May 17	Library Lions	This program showed wild life and natural beauty and man's use of rivers and recreation.
May 17	Meet The Press	Senator Robert Packwood (R-Ore.), discussed population control, among other things.
May 17	In Which We Live	This program showed the dangers of gas found in uranium mines and the introduction of Coho salmon into the Great Lakes, including as guests Drs. Sacromano, Archer and Martel; Lt. Governor Mark Hogan of Colorado and Dr. Howard Tanner.
May 22	NBC News Science Series "The Great Barrier Reef"	This special film documentary considered the possible destruction of the longest living coral reef on earth by "Crown of Thorns" starfish, along with the ecosystem of the reef.

App. 56

May 31	In Which We Live	This program concerned over- population, as reflected in the views of three married couples.
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Charles R. Halpern James W. Moorman Geoffrey Cowan

ATTORNEYS AT LAW
Center for Law and Social Policy
2008 Hillyer Place, N.W.
Washington, D.C. 20009

July 30, 1970

Mr. Dean Burch, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Burch:

More than four months ago Friends of the Earth (FOE), a leading conservation organization, filed a formal complaint against WNBC-TV's failure to provide its viewers with adequate information about automobile-produced air pollution. The complaint, which was filed on March 14, is based on the precedent and reasoning of the cigarette cases. It focuses on the barrage of advertisements for automobiles and gasoline which appear on WNBC-TV. FOE wants WNBC to offset the effect of these commercials by providing viewers with information about the health hazards of automobile pollution, and with suggestions about positive and effective steps which concerned voters, consumers, and merchants can take. On April 7, my colleague James Moorman sent the Commission a supplement to the complaint in which he outlined the ways in which we believe that the National Environmental Policy Act affects your responsibility in this

case. Since that time there have been a series of developments bearing on the complaint which we wish to bring to your attention.

1. FOE's complaint has been formally supported by New York City's Environmental Protection Administration (letter from Hon. Jerome Kretchmer to Dean Burch dated June 20, 1970) and Citizens for Clean Air (letter from Barry D. Rein to Dean Burch dated June 23, 1970). Both the City and the citizens' group emphasized the serious health hazards created by New York's automobile-produced air pollution and WNBC-TV's apparent failure to give the problem the attention it deserves.

2. During the last week the health hazards created by New York City's automobile-produced air pollution have reached crisis proportions. This morning the *New York Times* reported:

"Mayor Lindsay, declaring that air pollution had reached crisis levels here, put the city on an alert yesterday that could ultimately mean steps as drastic as banning private automobiles from congested parts of the city." *New York Times*, July 30, 1970, p. 1 (see attached clipping).

The crisis, which has been building during the last week, is only the latest manifestation of years of complacency on the parts of industry and the public. In its lead editorial this morning the *Washington Post* pointed out that

"The dangerous cesspool of air that now hangs over this city and the eastern seaboard is a shock but not really a surprise. The bread we threw out on the water now returns to us . . . we cannot blame the fickleness of nature for this mess; it is man-made, largely by the exhaust fumes from automobiles and buses, according to local officials." *Washington Post*, July 30, 1970, p. A20 (see attached clipping).

Increasingly, city officials are asking New York area car owners and merchants to take individual action to forestall

the crisis. Last week the Mayor met with downtown merchants. As a result of that meeting, the *Times* reported, only "Four of the seven bus lines that run down the avenue were allowed to operate, and autos were barred from 57th to 34th Street, eight blocks extra to the south," *New York Times*, July 26, 1970, p. 26 (attached). Yesterday, the *Times* reported, the Mayor asked the public to avoid all nonessential driving and "suggested the use of car pools and public transportation," *New York Times*, July 30, 1970, p. 23.

News stories for the past several days have described the pollution build-up. On Saturday, July 25, meteorologists in New York's Department of Air Resources reported that air "pollution [is] at the peak of unsatisfactory under Federal standards and on the verge of unhealthy," *New York Times*, July 26, 1970, p. 1.

Moreover, during the last few days New York's normal air pollution problems (discussed in FOE's complaint and Mr. Kretchmer's letter of support) have been compounded by Los Angeles type problems with oxidants, most of which result from automobile pollution. The *Times* reported:

"...the fact that oxidants are being implicated is adding new problems to New York's already complex—and unsolved—air pollution problem.

"Oxidants are secondary results of air pollution. They are created through a reaction in the presence of strong sunlight of nitrogen oxides, which come from burning processes, and hydrocarbons, which come mainly from automobile exhausts.

* * *

"The commissioner [of New York City's Department of Air Resources] said oxidants reached their peak last Friday when levels of 0.14 parts per million party of air were reached.

" 'These are the kind of levels,' he said, 'you associate with eye and lung irritation.' He noted that so far no standards had been set by the Federal and

state authorities for maximum tolerable levels of oxidants. But, he said, Federal criteria issued earlier this year said levels as low as 0.10 parts per million can cause eye irritation." *New York Times*, July 28, 1970, p. 27.

3. By letter to Hon. Ben F. Waple, the Washington attorney for WNBC-TV has now formally assured the Commission that "WNBC-TV has presented many programs and announcements which do express the anti-pollution point of view" (letter from Howard Monderer to Ben Waple, July 13, 1970). In support of this contention, Mr. Monderer attached an eight page list of 50 "programs discussing pollution broadcast by WNBC-TV January 1 through May 31, 1970." His letter also stated that:

"In addition to these programs, news reports in which an anti-pollution viewpoint was expressed were carried on a number of occasions, and over 200 public service announcements for anti-pollution, conservation, and other related organizations in the field of ecology or environment were carried by WNBC-TV during the first 6 months of 1970."

Mr. Monderer's letter and attachment give the Commission some basis for an evaluation of the extent to which the station's programming has fulfilled its obligation to present information about the health hazards of automobile-produced air pollution, and the steps which concerned voters, consumers, and merchants can take. After examining the list with some care and reconstructing the contents of most of the programs through telephone conversations with program producers and participants, we have concluded that WNBC-TV has broadcast virtually no such information. At most, one-third of the 50 programs cited by the stations had anything to do with air pollution, and only five or six of these appear to have presented even the most cursory discussion of automobile pollution.

FOE does not contend that WNBC-TV has totally failed to discuss ecology. On the contrary, FOE recognizes that the station (and network) made a particular effort to discuss the environment this spring.* However, FOE does not believe that programs on "The World of the Beaver," pesticides, and "The Great Barrier (Coral) Reef"—three of the programs listed by Mr. Monderer—satisfy WNBC-TV's obligation to offset the effect of massive advertising by the automobile and oil industry. These programs, of course, have nothing to do with the automobile exhaust problem which is the subject of FOE's complaint.

4. Meanwhile, a recent study by the Television Bureau of Advertising demonstrated that "Television is the dominant medium for providing new-car information to upper income and young adults" ("How TV Keeps Nation on Wheels," *Broadcasting*, July 13, 1970, p. 28). According to the TBA survey, between 1965 and 1969 TV grew as a primary new-car information source by 11 percentage points among upper-income adults. The survey also found that 65 percent of all adults credited TV as their main source of information on 1970 cars.

5. One reason for WNBC-TV's failure to discuss automobile pollution in depth is the natural reluctance to criticize [sic] the products made by some of the station's principal sources of revenue. While WNBC-TV undoubtedly tries to withstand the pressure, programing decisions are affected in countless subtle ways by the Madison Avenue environment in which there is full cognizance of advertiser attitudes. A few recent developments illustrate some of the ways in which television executives may justifiably expect commercial sponsors to attempt to influence programing—including news programs—which might jeopardize sales of their product.

*We regret that the intensity of this programing probably will not be repeated. "In Which We Live" was cancelled last month, less than two months after its widely publicized premiere, and the Today Show broadcasts during Earth Week will probably never be duplicated.

—On July 16, WNBC-TV broadcast "Migrant—An NBC White Paper." The documentary contained some particularly unflattering film footage on Coca Cola which, through its subsidiary Minute Maid, owns citrus farms in Florida. The *New York Times* reported that "NBC, following an angry meeting with representatives of the Coca Cola Company, altered its documentary on migrant farm workers before the program was broadcast over NBC television last night." (*New York Times*, July 17, 1970, see attached clipping.)

—Several months ago the censor's office of the NBC television network decided that some Excedrin commercials were misleading and that the commercials should not be run by the network. As a result, Bristol-Meyers, manufacturer of Excedrin, has stopped buying advertising time on NBC for any of its products. (See *Advertising Age*, April 20, 1970.)

—On July 29, 1970, Rep. Leonard Farbstein delivered a speech in the House of Representatives in which he described the pressure which Proctor and Gamble brought to bear on WNBC-TV in May, 1969, after the station carried a news program in which Bess Meyerson Grant criticized the deceptive pricing practices of Mr. Clean, the household cleaning product. According to Farbstein, the advertising agency called station executives to complain and then "pulled without explanation prime time sponsorship of another program two days later." In his speech, Farbstein said he has written a letter to the Commission asking that such practices by advertisers be investigated.

Efforts by advertisers to influence news programming have, of course, been going on for some time. In 1965 *Consumer Reports* carried an account of the speech which Paul Willis, then president of the Grocery Manufacturers Association, delivered to a meeting of the Television Bureau of Advertising:

"He reported that he had suggested to a meeting of publishers 'that the day was here when their editorial department and business department might better understand their interdependent relationship as they affect the operating results of their company; and as their operations affect the advertiser—their bread and butter.' The magazine people, he continued, had understood. They had begun to write articles to create 'a favorable public attitude' towards food advertisers. He regretted, however, that he could not say 'similar nice things about the relationship of our advertisers with television.' Television received, he pointed out, 'about 65 percent of their advertising revenue from GMA members.' These advertisers, he said, 'have seen some television newscasts where they seemingly took great delight in bellowing out stories that were critical of his industry.' He referred to Senator Hart's hearings specifically in complaining of critics who 'used isolated cases as examples of wrongdoings and smudged the entire food industry,' and he closed his remarks with a question: 'What can you do additionally that will influence your advertiser to spend more of his advertising dollar with you?'

"The broadcasters, it appeared, knew the answer. Except for a mention on NBC's Huntley-Brinkley report and a reference on that network's program, Calender, television, so far as CU has been able to find, paid no attention to the 1963 packaging hearings. On radio, only the labor sponsored commentator, Edward P. Morgan, on ABC, gave news about them, and since then, several scheduled television appearances of Senator Hart have been cancelled. 'Off the record, I was told television advertisers had objected,' Hart said.'" *Consumer Reports*, March 1965, p. 119.

These stories assume special significance in light of broadcasters' extraordinary reliance on automobile and gasoline advertising. In 1968 these combined industries spent \$284 million on television advertising. Moreover, the percentage

of automobile company expenditures in local (rather than network) spots is increasing rapidly. The stations indicated the importance of this source of revenue in April when the Radio Advertising Bureau and the Television Bureau of Advertising organized a campaign to persuade radio and television broadcasters to run free industry-produced plugs for auto sales. RAB campaign organizers predicted that radio stations alone would contribute at least \$5 million of free advertising time to the automobile industry during this campaign.

In sum, during the past four months it has become increasingly clear that representatives of substantial segments of the 'population of New York City are troubled by WNBC-TV's failure to present important information about a subject which poses a health crisis of major dimensions. Recent events have also demonstrated that to hold down dangerous automobile air pollutants in the short run requires individual voluntary action on the part of car owners, merchants, and other citizens as an integral part of firm governmental action.

The station has presented the Commission with a list of 50 programs which, it claims, fulfill its obligation to present such information; but a closer examination of the list casts serious doubt upon that claim. While the Commission generally prefers to rely on a broadcaster's good faith in such circumstances, the fear of advertisers' economic reprisal may make it difficult for broadcasters, in the absence of a clear rule laid down by the Commission, to present programs which might threaten the well being of a group of highly important customers.

We urge the Commission to enunciate a clear policy position which will require licensees to act in the public interest. We believe that a quick review of the 50 programs listed by WNBC-TV will demonstrate that the station has thus far failed adequately to inform the public of the issues at stake in the health and environmental effects of automobile pollution. If the station's failure to satisfy the requirements of

the Communications Act is not clear to the Commission on the face of the documents, we urge the Commission to request that WNBC-TV supply it with transcripts of the programs it has cited, and make copies of the transcripts available to FOE and Mr. Kretchmer for comment. We are confident that those transcripts will instantly illustrate the gap between the propaganda bombardment sponsored by industry and the information on the health and environmental effects of automobile-produced air pollution which WNBC-TV has presented to the people of New York City.

On March 21 NBC presented actor Hal Holbrook in "A Clear and Present Danger," an original production on Saturday Night at the Movies. WNBC-TV's compendium of programs on pollution describes the movie as a "feature film drama about a United States Senate candidate who is criticised for being more concerned with air pollution than 'politics' [and] succeeds in awakening the town to the need for air pollution control."* In the film, Holbrook averts what might have become a major health disaster by courageously forcing industry, at great expense, temporarily to turn off polluting smokestacks. The situation is not so different in New York today except that the principal source of the danger is the automobile rather than stationary polluters. The times demand rules which will make industry as concerned about health as profits, and which will enable broad-

*The principal sources of air pollution in the film are Industrial plants, not automobiles.

App. 65

casters to serve the needs of the public without unnecessarily offending their advertisers.

Sincerely,

Geoffrey Cowan

cc:

Commissioner Robert T. Bartley
Commissioner Kenneth A. Cox
Commissioner Nicholas Johnson
Commissioner H. Rex Lee
Commissioner Robert E. Lee
Commissioner Robert Wells
Mr. Ben F. Waple, Secretary
Mr. William B. Ray, Chief, Complaints & Compliance Div.
Mr. Henry Geller, General Counsel
Mr. George Smith, Chief, Broadcast Bureau
Mr. Gary Soucie, Executive Director, Friends of the Earth
Mr. Jerome Kretchmer, Administrator, Environmental
Protection Administration, City of New York
Mr. Howard Monderer, Washington Attorney, NBC
Mr. Barry D. Rein, Vice President, Citizens for Clean Air

City Warned Air Pollution Nears an Unhealthy Level

By MARTIN GANSBERG

Meteorologists warned yesterday that the city's air-pollution levels "border on the unhealthy range" and said that "the situation bears close watching."

"There'll be poor ventilation tonight and tomorrow morning with only a slight improvement in the afternoon," said Harold Nudelman of the Department of Air Resources. "But we could have more problems. It could get worse."

He explained that sulphur dioxide readings taken by the department showed a city average of 0.10 for every million parts of air. Acceptable readings are below 0.06, he said.

"This places the pollution at the peak of unsatisfactory under Federal standards and on the verge of unhealthy," Mr. Nudelman said.

Harvey Sands, a meteorologist with the Weather Bureau here, said that "marginal air pollution conditions" would last through this afternoon.

The combination of humidity, contamination and temperatures

in the high 80's made the city oppressive.

Those who resorted to air-conditioning were alerted to the possibility of electric-power

problems as Consolidated Edison sought to meet rising demand despite difficulties with equipment.

The pollution problem developed, Mr. Sands explained, because of temperature inversion in the atmosphere yesterday morning in which air from 350 to 800 feet above the earth warmed up instead of cooling off.

Normally warm air rises toward cooler air above, keeping the air in motion. When the upper air is warm this flow stops, trapping contaminations close to the ground.

"No air pollution advisories are in effect at this time," he said, "but the situation bears close watching, and we will be watching."

The weather did not deter

Continued on Page 36, Column 7

CITY IS CAUTIONED ON AIR POLLUTION

Continued From Page 1, Col. 2

thousands of strollers from using Fifth Avenue as a promenade for the third consecutive Saturday as traffic was again barred from the street.

There were two changes made as a result of a meeting Mayor Lindsay and merchants held during the week. Four of the seven bus lines that run down the avenue were allowed to operate, and autos were barred from 57th to 34th Street, eight blocks extra to the south.

Strollers Move Freely

Strollers and cyclists moved about freely until noon, when a sudden thunder shower sent them scurrying for cover. Some cyclists, however, braved the rain and pedaled along the avenue.

An Air Resources Department mobile laboratory, parked between 52d and 53d Streets, issued periodic readings on pollution. An elderly woman, a department-store shopping bag under her arm, looked at the noon reading and said:

"Is it good or bad? It's always bad. But who's going to leave New York? What do you think we are, crazy?"

Near the mobile laboratory, R. Alex Baron, executive president of Citizens for a Quieter City, measured noise levels on the avenue.

"This will lead to a greater freedom of speech on the streets," he said, because con-

versations are easier to carry on without traffic.

Many out-of-towners were impressed by the greater mobility at street crossings.

"The buses make it a little harder to walk in the middle of the street," said Michael Rogin of Berkeley, Calif. "I'd favor a total traffic ban."

Representatives of the city's Departments of Transportation and Commerce, handed questionnaires to passers-by seeking reactions to the traffic ban on Fifth Avenue. The questions dealt with shopping habits and bus service.

One area of the city seemed to thrive on the weather. Fred Moran, chairman of the board of directors of the Coney Island Chamber of Commerce, said that record crowds had turned out at the beachfront. A haze hid the tops of some of the amusement rides, he said, but there was no rain.

NEW YORK TIMES, July 30, 1970, page 1.

CITY PUT ON ALERT AS AIR POLLUTION HITS 'CRISIS' LEVEL

Mayor Acts as Stagnation
Continues Into 6th Day,
Worst Since Friday

BAN ON AUTOS POSSIBLE

Health Department Reports
No Immediate Danger—
Incinerators Curbed

By DAVID FIED

Mayor Lindsay, declaring that air pollution had reached crisis levels here, put the city on an alert yesterday that could ultimately mean steps as drastic as banning private automobiles from congested parts of the city.

The Mayor acted in the morning after air-pollution levels climbed to their highest point since last Friday, when a stagnant air mass trapped pollutants over much of the Eastern Seaboard, including the city.

While the city's Health Department reported no immediate health hazard from the air pollution, officials said the

alert had been called to prevent the contamination from reaching the danger point.

Rain and a slight increase in the wind yesterday afternoon eased pollution levels somewhat, and the Mayor said cars would not be banned for the moment.

Dispersal Prevented

He kept the alert in force, however, as the Weather Bureau predicted that the stagnation, which has prevented normal dispersal of airborne pollutants, would continue at least through tomorrow.

An immediate step taken in the alert was a cutback in the use of incinerators in public buildings and at Sanitation Department disposal facilities. Also, the Mayor appealed to the public to avoid non-essential driving.

Part of the reason for the air-pollution alert, according to some city officials, was the emergency action taken Tuesday by the Consolidated Edison Company to ease another crisis—the power shortage.

At Con Edison's request, the subway system cut back its use of power Tuesday afternoon in an effort to avert a blackout in the city. Yesterday morning, as the Mayor met with his Emergency Control Board, officials said that the cutback, which slowed subway service, had led substantially more people to drive their cars into the

Continued on Page 23, Column 3

heart of the city in the expectation that subways would be behind schedule.

The officials apparently based that assumption on spot observations, because no figures were available yesterday morning to show an increase.

Later in the day, the only figures that became available were from the Port of New York Authority. They showed a decrease in traffic into the city during the 8-to-9 A.M. rush hour compared with Monday and Tuesday, on the authority's Hudson River crossings.

Despite the uncertainty about the auto-traffic figures, Con Edison has agreed to seek other means of reducing the consumption of electricity before asking for more cutbacks by the subway system.

"I wish to make clear," the Mayor said at a City Hall news conference, "that every effort will be made by Con Ed to maintain power for the subway system."

Sanitation Unit Acts

The Sanitation Department cut the burning at its large incinerators by 20 per cent. Individual on-site incinerators in municipal hospitals and Housing Authority projects were shut down.

The shutdown raised the potential problem of raw garbage accumulating, but officials said they hoped the air pollution would ease before the garbage pile-up reached a crisis stage.

There are 15,000 incinerators in buildings throughout the city. About 11,500 are in privately-owned buildings.

Although the Mayor ordered a shutdown of the public incinerators, he called on private owners only "to prepare for the possibility that all incinerators will be shut down."

A spokesman explained later that it would be prohibitively

difficult to police a shutdown of all private incinerators at this stage of the alert.

In asking the public to avoid all nonessential driving, the Mayor suggested the use of car pools and public transportation.

Rise-Fall Pattern

Though air-pollution levels were high yesterday morning, they dropped in the afternoon in a pattern that has become typical since the current stagnation began.

For example, the level of sulphur dioxide was reported at 0.19 parts per million parts of air at 8 A. M. yesterday. By 3 P. M., it was down to 0.13 parts. A concentration of more than 0.1 is considered unhealthy.

Smokeshade, or visible dirt in the air, was 3.3 units at 8 A. M. and 2.7 units at 3 P. M. More than 2 units of smoke-shade are considered unhealthy.

The pattern of a decline in pollution each afternoon and a

rise again at night has led to some disagreement between city officials and the Weather Bureau on the calling of an alert.

Mayor Lindsay said yesterday he was calling the alert under established procedures for dealing with air pollution crises. As he made his announcement to reporters, he held up a 32-page booklet outlining procedures adopted on Oct. 1, 1968.

He said he was invoking Stage 1, or the "alert" stage.

The booklet actually lists the first stage as the "forecast" stage.

New Procedures

Asked to explain the apparent discrepancy, Robert N. Rickles, the commissioner of

the city's Department of Air Resources, said the Mayor was invoking a stage that is based on new procedures that have not yet been announced.

The Mayor's action also was unusual in that it was not preceded by a forecast of high air-pollution potential by the Weather Bureau. This precondition is in the current procedures and also, it is reported, in the new procedures that are yet to be announced.

"I was on the phone with the Weather Bureau for half an hour trying to get them to call a forecast," Commissioner Rickles said yesterday.

The city finally acted on its own to short-cut the procedure because it felt there was a danger, Dr. Rickles said.

Bureau Criticized

He was critical of the Weather Bureau for not sharing the burden in calling an alert that could dislocate the lives of—and thus irritate—many people.

"To some degree they could have been more adventurous," Dr. Rickles said of the bureau.

But John Mayer, the forecaster in charge of the Weather Bureau at Rockefeller Center, said his office was only following criteria that had been set down in the regulations of Oct. 1, 1968.

Under these, air stagnation can continue unabated for at least 36 hours before the Weather Bureau issues its official advisory on a high air-pollution potential.

Mr. Mayer said that while the current stagnant air mass had persisted since last Friday, "we've had reasonably good ventilation in the afternoons" and that this had temporarily broken the pattern of stagnation every day.

The Washington Post

AN INDEPENDENT NEWSPAPER

THURSDAY, JULY 30, 1970

PAGE A20

A Cloud No Bigger Than the Eastern Seaboard

The dangerous cesspool of air that now hangs over this city and the eastern seaboard is a shock but not really a surprise. The bread we threw out on the water now returns to us. It is true that abnormal weather in the form of a mess of warm air that won't move on is a major weave in the blanket of pollution now covering us. But we cannot blame the fickleness of nature for this mess; it is man-made, largely by the exhaust fumes from automobiles and buses, according to local officials.

This raises the immediate question of whether the public can wait the 10 years the automobile industry has said it needs to produce clean cars. Has an independent group thoroughly looked into this time-table to see if 10 years really is needed? Or is it a comfortable pace the industry has set for itself? These are honest questions and there is an urgent need for answers; the air around us argues that anything less than a crash program to get clean air is basically a no-win effort.

A world-wide survey by the UPI reveals that we are not alone in our filth. Wallowing also in smog are places like Japan, Mexico City and Singapore. The ongoing series of articles on world pollution by Claire Sterling on this page has been detailing the theme that we are all in this problem together; action by one country and not by another will not do. And neither will it do to wait until things get worse.

A recent book called "The Vanishing Air" by John Esposito ends with a chapter called "Pollution and Palliatives." What he and his researchers tried to do, says Mr. Esposito, and in many people's opinion *did*, was "illustrate how the public's hope for clean air has been frustrated by corporate deceit and collusion, by the exercise of undue influence with government officials, by secrecy and

the suppression of technology, by the use of dilatory legal maneuvers, by special government concessions, by high-powered lobbying in Congress and administrative agencies . . ."

In saying where the blame lies, Mr. Esposito also implies where the remedy lies: in positive and immediate action by corporations, governments and citizens, not just in Washington or in the United States, but in every part of this blanketed planet.

The trouble is that as long as the menace remains invisible, by and large, we may fool ourselves into thinking that there is no urgency in the developing crisis of our environment, which suggests a silver lining in the great dirty cloud that has enveloped, not just a city, but an entire area of the United States the past few days. For what this has done has been to make the menace all too frighteningly visible, as a regional thing, which is only a step away from a continental, and ultimately, a planetary thing.

It is often said that the crisis of pollution and environment will fade away, like other fads, a victim of our short attention span, as the media turn to new trinkets or inserts to play with. But it won't, in our view, because it won't remain invisible. When the old and sick are in danger of dying along a whole seaboard, when officials in Washington and New York are ready to block roads to keep cars from being used, when the menace is inescapably there for all to see and breathe, it is not a fad which can fade away. A blind eye can be turned on the ghettos or the war but no one who ventured outdoors the last few days could avoid seeing what we are doing to ourselves. It would be nice to think that we could take sensible warning from a cloud no bigger than the eastern seaboard.

App. 73

Before The F.C.C. 70-862
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Re Complaint by :
FRIENDS OF THE EARTH :
Concerning Fairness Doctrine :
Re Station :
WBNB-TV [sic], New York, New York

August 5, 1970

Mr. Gary Soucie
Friends of the Earth
30 E. 42d Street
New York, N. Y. 10017

Dear Mr. Soucie:

This is in reference to the complaint filed on behalf of Friends of the Earth (FOE) on March 14, 1970, and supplements relating thereto filed March 22, 1970, and April 8, 1970, regarding the alleged failure of Station WNBC-TV, New York City, to comply with the fairness doctrine or to meet its public interest obligations concerning coverage of the issue of air pollution caused by automobiles and gasoline. You urge that the Commission's opinion on the *Applicability of the Fairness Doctrine to Cigarette Advertising* (9 FCC 2d 921 (1967)) and the related court decision, *Banzhaf v. F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968), are equally applicable to automobile and gasoline commercials and that they also represent one side of a controversial issue of public importance.

Your complaint includes copies of a February 6, 1970 letter to WNBC-TV setting forth your request that the station describe the methods it proposes to utilize to meet its obligations in presenting the other side of the automobile-gasoline/air pollution issue and the February 18, 1970 reply from WNBC-TV stating that the station has fulfilled its fair-

ness obligations on the issue of air pollution in its overall programming and declining your offer of anti-automobile/gasoline commercials.

In your March 14, 1970 complaint, you state that WNBC-TV's refusal of your request was improper and that the reasons given by WNBC-TV are based on erroneous interpretations of the applicable law and policy. WNBC-TV in its February 18, 1970 response stated its belief that the Commission's cigarette ruling¹ did not extend to automobile and gasoline commercials or the advertising of any other commercial product; that the automobile and gasoline commercials do not represent the presentation of one side of a controversial issue of public importance; and that WNBC-TV has fulfilled its fairness obligations with respect to the issue of air pollution in its overall programming and will continue to do so. WNBC noted that between November 1969 and February 1970 it had presented one documentary, two panel discussions and two news features dealing with air pollution and including the effects of automobile related pollution.

In support of your position you argue that the "public interest" standard referred to in the Commission's cigarette ruling was not limited to that product but rather that the Commission developed the standard of whether the product's "normal use has been found by Congressional and other Governmental actions to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance . . ."² It is argued that governmental action on air pollution

¹ *Applicability of Fairness Doctrine to Cigarette Commercials*, 9 FCC 2d 921 (1967), *aff'd sub nom, Barzhaf v. F.C.C.*, 405 F.2d 1082 (1968).

² *Applicability of Fairness Doctrine to Cigarette Advertising* at p. 943.

is evidenced by both presidential messages³ and Congressional action⁴.

The second argument advanced is that auto and gas advertisements (particularly those for large-displacement engines and lead additive gasolines) generally convey a message that such products (and necessarily the pollution they cause) are a requirement for the full rich life. The automobile commercials extol the virtues of large car size, "be a big rider," "4-barrel V-8" engines and "up to 429 cubic inches" and imply that automobiles are consonant with an unpolluted environment (e.g., by showing an automobile on a clean beach), thus, it is argued, representing one side of controversial issue of public importance—i.e., whether in the short run the public should prefer unleaded gasoline and small-engined cars which utilize less lead additive gasoline until the auto and gas companies convert to non-polluting products.

³President Nixon's February 10, 1970 Address to Congress— "... pollution is our most serious environmental problem." President Nixon's State of the Union message—"The automobile is our worst polluter of air."

⁴The Clean Air Act of 1965, supplemented by the Air Quality Act of 1967 and more recently by the National Environmental Policy Act of 1969 (NEPA), Public Law 91-190, 83 Stat. 852 (1970), which requires federal agencies "to use all practical means, consistent with other essential considerations of national policy . . ." to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." (Public Law 91-190, §101(a)(b)) *Texas Committee on Natural Resources v. U.S.*, (Case No. A 69 CA 119, February 5, 1970, W.D. Texas). You also cite the report to be issued by the National Air Pollution Control Administration (NAPCA) (as summarized in the Wall Street Journal of March 5, 1970) regarding the danger and prevalence of carbon monoxide (CO) pollution in urban areas and the fact that 75% of such pollution comes from motor vehicles. According to complainant, the NAPCA report will propose standards for CO emissions and possibly require stricter motor vehicle exhaust emission controls than presently exist.

Finally, you assert that the programs cited by WNBC-TV relating to air pollution do not fulfill the fairness obligation the station has incurred through the broadcast of innumerable automobile and gasoline commercials. This fairness obligation, you suggest, cannot be fulfilled by regular programming because of the nature and frequency of the commercial announcements. *Banzhaf v. F.C.C., supra*.

By letter dated June 22, 1970, the Environmental Protection Administration (EPA) of New York City strongly supported the position taken by the Friends of the Earth in its complaint. The Administration's submission set forth the pollution problems caused in New York City by autos and use of leaded gas, cites extensive supporting authority and pertinent Congressional enactments. In addition, on June 24, 1970, the Citizens for Clean Air, Inc. (CCA), submitted a telegram expressing their support for FOE's complaint and expressing that organization's willingness to provide stations with anti-pollution messages.

By letter dated July 13, 1970, NBC responded to the above letter of EPA. It reiterated its position and further stated that "WNBC-TV has presented many programs and announcements which do express the anti-pollution point of view." It attached a partial list of such programs during the first five months of 1970 and stated that in addition, "news reports in which an anti-pollution viewpoint was expressed were carried on a number of occasions, and over 200 public service announcements for anti-pollution, conservation, and other related organizations in the field of ecology or environment were carried by WNBC-TV during the first 6 months of 1970." NBC therefore urges that the public is being informed on the anti-pollution viewpoint.

Finally, by letter dated July 30, 1970, Mr. Geoffrey Cowan submitted a letter setting forth a series of recent developments bearing on the complaint (e.g., the health hazard crisis created by New York City's automobile-produced air pollution (p. 2 Letter). Mr. Cowan does not contend that WNBC-TV "has totally failed to discuss ecology".

noting that it made "a particular effort to discuss the environment this spring" and in particular with the Today programming and the program, "In Which We Live". Mr. Cowan's letter does assert that WNBC-TV coverage of the air pollution issue is inadequate; that "at most, one-third of the 50 programs cited by the stations had anything to do with air pollution, and only five or six of these appear to have presented even the most cursory discussion of automobile pollution." (p. 4 Letter). He further believes that "One reason for WNBC-TV's failure to discuss automobile pollution in depth is the natural reluctance to criticize the products made by some of the station's principal sources of revenue." The letter urges, *inter alia*, the Commission to enunciate a clear policy position which will require licensees to act in the public interest in this field.

We have reviewed the arguments presented and conclude that although no action is warranted against WNBC, a full statement of our position would be helpful to broadcasters and the public alike.

DISCUSSION

We shall first discuss the pertinent background factors and then the particular complaint here.

In the *Cigarette Advertising* ruling, *supra*, the Commission applied the fairness doctrine—really the public interest standard (see *id.* at p. 927, para. 14)—to the broadcast of cigarette commercials. We pointed out that the normal use of cigarettes had been found by the Government to be a hazard to health (e.g., Surgeon General's Reports; Congressional enactments); that broadcasters were presenting commercials urging people to smoke; and that therefore the public interest required that the public also be informed, to a significant extent, that however enjoyable smoking may be, it does represent a hazard to health. As a practical matter, this ruling resulted in the presentation of anti-smoking messages, in a reasonable ratio to the smoking commercials, including periods of maximum audience listening. See *NBC, Inc.*, 16 FCC 2d 956.

At the time we adopted the above ruling, it was urged that it could not be limited to just one product, cigarettes; that it would logically have to be extended to many others, with the result that the present commercially based system of broadcasting would be undermined. We rejected that argument (9 FCC 2d 921, 943-945). We set forth our view that cigarettes were a unique product in this respect. We recognized of course that many advertised products have negative aspects in use. Automobile [sic] result in many deaths each year and because their gasoline engines constitute the main source of air pollution (S. Rept. No. 91-745 91st Cong. 2d Sess., p. 3), they raise most serious environmental problems. Such problems are raised by a host of other products or services—detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc. The list could be extended greatly. We believed, however, that cigarettes are distinguishable

from these products on a number of grounds that really coalesce:⁵

(i) Cigarette smoking does not involve a balancing of competing interests. It is a habit—like snuff or chewing tobacco—which can fade away and, indeed, which the Government for health reasons is urging people either not to begin or to stop at once. That is not true of the other products. As stated, they all involve ecological problems. These problems call for remedial action of varying nature, and some are certainly urgent. However, the Government is not urging people to stop *now*—without any delay—buying or using gasoline-engine automobiles, the detergents, or electricity. The benefits and detriments here are of a more complex nature, and do not permit the simplistic approach taken as to cigarettes.⁶

(ii) Indeed, because of the above consideration, we stated in our *Cigarette Advertising* ruling that the real question was how such a product could be promoted at all on a medium impressed with the public interest. In view of the Cigarette Labelling Act of 1965, we could not act on that question, but with the expiration of that Act, we proposed to ban cigarette advertising. See Notice of Proposed Rule Making, 32 F.R. 13162. And Congress has of course acted to do so. Public Law 91-222. No one proposes to stop promoting or using the fruits of the technological revolution (e.g., to stop all use of autos or trucks); rather, we are recognizing that we must take prompt action to come to terms with the environmental effects of that technology.

⁵We also noted that it is the normal use of cigarettes in any amount that is hazardous—not an abuse as in the case of automobile accidents or aspirin.

⁶We do not by the above mean to denigrate the seriousness and urgency of the problem of gasoline-engine automobile pollution problem. Thus, we recognize that, because of weather conditions or other factors, there may be Governmental strictures on the use of automobiles in major cities. But nevertheless the problems are complex.

(iii) Finally, action can be taken effectively in these areas, and therefore the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising aspect. It was urged that cigarettes are a legal product, and thus there can be no question of promoting their use. To this we answered that in light of the national experience with liquor, prohibition of use of cigarettes might be adjudged poor policy by the Congress, but that would be all the more reason to act effectively in the areas that remained open—namely, educational campaigns and forbidding promotion (which would undercut such campaigns). See *Letter to Senator Moss*, September 17, 1969, 23 FCC 2d _____. This consideration is not applicable to these other products or services. There could be no thriving bootlegging industry of airplanes, electric power plants, autos, detergents, etc. This means that more direct and effective Governmental action, if appropriate, is perfectly feasible. See discussion, *infra*, pp. 8-9. [App. 83-84]

This brings us to the gravamen of the complaint here—that the public should be informed of the issue, as a predicate for action by elected officials. We agree fully that these environmental issues constitute issues of great importance. See, e.g., Message of President Nixon, February 10, 1970. Licensees must devote a reasonable amount of time to such issues, as a most important part of their obligation to operate in the public interest. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1248-9 (1949). In *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 394 (1969), the Supreme Court stated:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridg-

ment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

It is up to the licensee to determine, reasonably and in good faith, the nature of its coverage of these most vital environmental issues (e.g., the format of the program; the appropriate spokesmen, etc.) *Report on Editorializing by Broadcast Licensees, supra*, at p. 1250. As stated, the issues are not simple ones but rather involve difficult questions concerning the steps to be taken, both short and long term, the transitional periods to be allowed, the allocation of cost among the manufacturer, consumer and government, etc. Thus, the question of pollution by the internal combustion engine has been framed in terms of emission standards (see, e.g., 1967 Clean Air Act; 1968 rule by the National Air Pollution Control Administration of HEW, 33 Fed. Reg. 8304; or, in view of the increasing number of cars, of the eventual development of "a new [propulsion] system which . . . produces few pollutants and performs as well or better than the present power plant" (S. Rept. No. 91-745, 91st Cong., 2d Sess., p. 4; e.g., the gas turbine engine; steam (Rankine cycle) engine). The short-term solution also poses complex issues. Since we are not expert in this field, we simply note that there are several approaches besides the one urged here by complainants (e.g., emissions standards, with periodic inspections; restriction on use of automobile, etc.). Further, the pollution issues of several products are often interrelated. Thus, it has been stated that elimination of phosphates from detergents will not be effective if steps are not taken concurrently with respect to sewage, etc., (e.g., Joshua Lederberg, *Washington Post*, June 6, 1970, p. A15). Coverage by programs tailored to illuminate these aspects is clearly called for. In this connection, the matter again differs from the cigarette area, where it was appropri-

ate, and indeed fair, simply to track the cigarette advertisements with announcements calling attention to the fact that cigarettes are the main cause of such diseases as lung cancer, emphysema, and chronic bronchitis. See Federal Trade Commission Notice, 29 F.R. 8325.

This last citation points up again the distinctions between the cigarette and these products. Were they the same, as urged by complainant, then we would be requiring each advertisement to contain the warning to the public of the health hazard. There is clearly no more effective way to proceed, and indeed, with a matter such as cigarettes, it is the only appropriate way—that since the public is being urged to consume a hazardous product (e.g., main cause of lung cancer, etc.), that it be informed, both in the advertising and labelling, of the hazard.⁷ Complainants do not urge this, presumably because it would spell the end of all these product commercials. Indeed, we stress again that were the two matters really the same, we would be proposing to ban promotion of these high-powered automobiles or leaded gasoline, since that is our stated view as to cigarettes. See Notice of Proposed Rule Making in Docket No. 18434, 32 F.R. 13162. Significantly, complainants do not request such a ban, thus tacitly recognizing that there is a significant difference.

From the foregoing, our conclusion on the complaint now before us is clear. There is the threshold issue whether these commercials, which are essentially advertising slogans, such as "Dodge Rebellion" or "Ford has a better idea," "Quick start in cold weather," or "put a tiger in your tank," present one side of a controversial issue in this complex field. Further, complainant in effect calls for ascertainment

⁷Only passage of the Cigarette Labelling Act of 1965 prevented effectuation of such an administrative requirement. Indeed, what complainant does not recognize is that the cigarette fairness ruling was a stop-gap requirement until termination of the 1965 Act. See para. 31, *Cigarette Fairness* ruling 9 FCC 2d 921.

of the number of commercials promoting high-powered cars, the number promoting the smaller cars, the number and nature of the programs dealing with the issue of air pollution stemming from the gasoline engine automobile,⁸ and then a judgment whether the difference in time, as between the large and small cars, is sufficiently great to call for the presentation of further time to the side which the complainant espouses. We have no such information before us, but we decline in any event to extend the cigarette advertising ruling to these other products. We believe, for the reasons set forth previously, that we should adhere to our previous judgment that cigarettes are a unique product, permitting the simplistic approach adopted in that field.

However, even assuming that we are wrong in that belief, we would not extend the ruling generally to the field of product advertising. That is what, in effect, complainant urges since, as stated, a great many products have some adverse ecological effects. Were we to adopt a scheme of announcements tracking in a significant ratio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest. It is not required, since there is the alternative of providing advertiser-supported programming, valued by the public, by means of the product commercial, and at the same time affording appropriate time for discussion of these vitally important issues. In short, our action must be guided by one standard, the public interest (Sec. 303(g) of the Communications Act; *NBC V. U.S.*, 319 U.S. 119 (1934)), and on that standard, extension of the cigarette ruling is not in order.

In so stating, we fully recognize that the public interest standard must take into account public health (*Banzhaf v. F.C.C.*, 405 F.2d 1082, 1096 (CA DC 1969)) and specifically the environmental pollution aspects of public health.

⁸We also take note that, unlike cigarettes, some gasoline commercials increasingly do urge the use of gas which is less polluting.

See National Environmental Policy Act of 1969, 83 Stat. 852, setting forth the "... continuing policy of the Federal Government to use all practicable means and measures in a manner calculated . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans" (Section 101(a)). The Act further states that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" (Section 102). We believe that our action today does so, and that for the reasons set forth in this opinion, it is *Red Lion*—not the cigarette advertising ruling—which should be followed here as the best means of fulfilling our obligations under the 1969 Act.

We wish to emphasize that our ruling is restricted to the general product advertisement (e.g., "Join the Dodge Rebellion," "Put a Tiger in your tank," etc.). Obviously, a commercial could deal directly with an issue of public importance; if so, the fairness doctrine is fully applicable.

We also recognize that regulation of commercials may be a device used in a government campaign against pollution. As stated in point (iii), (p. 4, *supra*) [App. 80], it would appear that if, for example, recycling makes sense, the Government would simply move to require such recycling in place of disposable containers; if detergents with enzymes or phosphates should not be sold, such products should be banned after a specified date (e.g., the Canadian law on detergents with a specific amount of phosphates—the *New York Times*, August 2, 1970, p. 26); if only automobiles with engines of a certain size should be shipped or sold, that can readily be specified. However, we are not the experts here. It may be that a program of limiting advertising on the basis of pollution considerations would also be a helpful, transitional tool, just as taxation is apparently being proposed. See, e.g., President's Message on new taxes on non-leaded gaso-

line, February 10, 1970. If so, here again the matter is one for consideration by the Congress—not this agency which is not, and cannot be, the arbiter of such matters. And any decision made could then be applied across-the-board. This is not only a fairer way to handle the matter (see Letter to Senator Moss, September 17, 1969, *supra*) but also avoids the danger that restricted to one medium, there is the substantial possibility of a corresponding increase in promotion in the other media, in order to offset the restriction. We would of course assist fully in the implementation in the broadcast field of any decision made by an agency appropriately authorized by the Congress to act in this respect.

Finally, we shall comment briefly on the contention that this preserves the commercial broadcast system, when the issue in question is whether life will be preserved—whether there will be anyone to tune in the commercial broadcasts. First, our action is logically and clearly called for, since the commercial broadcast network facilitates public focus on these great issues. If that system is undermined, it does not promote solution of our environmental problems—rather, it would work against such solution by eliminating or crippling a most important information device. But all this means that the device must be used to inform—that it must fully and effectively meet its *Red Lion* obligations. To give but one example, the Washington Evening Star of May 29, 1970, p. A-14, quotes the following Congressional testimony of Mr. Russell E. Train, the chairman of the President's Council on Environmental Quality,

“The supersonic transport will fly at an altitude between 60,000 and 70,000 feet. It will place into this part of the earth's atmosphere quantities of water, carbon dioxide, nitrogen oxide and particular matter. . . . A fleet of 500 American SSTs and Concorde flying in this region of the atmosphere could, over a period of years, increase the water content by as much as 50 to 100 percent “Water in this part of the atmosphere can have two effects of practical significance. First it would affect the bal-

ance of heat in the entire atmosphere leading to a warmer surface temperature Secondly, water vapor would react so as to destroy some fraction of the ozone that is resident in this part of the atmosphere. The practical consequences of such a disruption could be that the shielding capacity of the atmosphere to penetrating and potentially dangerous ultraviolet radiation is decreased."

We cite the above only as a recent example of an environmental issue (see also *The New York Times*, August 2, 1970, p. 1); we could have referred to the mercury crises or the metallic pollution problem. We do not know if Mr. Train is correct or not, or whether the SST should not be authorized. Clearly, however, this is an issue of public importance which must be resolved. Broadcasters must discharge their public trust by contributing fairly and effectively to an informed electorate on these vital issues.

In sum, we decline to extend the cigarette rulings to these products commercials, and specifically hold that it would be inconsistent with the public interest to ban these commercials, have them contain health hazard announcements, or require announcements geared in some ratio to these ordinary product commercials. On the other hand, the broadcaster does have an obligation to inform the public to a substantial extent on these important issues, including prime time periods. While we have stressed that the broadcaster has large discretion in choosing and covering controversial issues of public importance, it would be no more reasonable for broadcasting to ignore these burning issues of the seventies—which may determine the quality of life for decades or centuries to come—than it would be to ignore the issue of Vietnam or the issue of racial unrest in communities racked by this problem.⁹

⁹Of course, the broadcast licensee retains discretion as to issues, format, appropriate spokesmen, etc. Thus, a broadcaster located in an area with no air pollution issue but a severe water pollution one would clearly focus on the latter. Another, such as in New York City, would be confronted with public issues in both respects. In short,

It is not necessary to peg the above obligation on the fact that the broadcaster is carrying these product commercials and therefore should reasonably inform his public concerning associated environmental issues. For, under *Red Lion* he must do so, whether or not he carries the commercials. DDT or mercury compounds are rarely, if ever, advertised, but that does not mean that the public should be uninformed if there is a crucial controversial issue raised by their use. If, after cigarette advertising ends on broadcast media, cigarette smoking continues to cause a rising epidemic of death, the broadcaster cannot ignore discussion of the public health matter raised by that epidemic. In the words of the Court in *Red Lion*, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (395 U.S. at 389).

The foregoing is, we believe, responsive to the request that we enunciate clearly the public interest considerations applicable to this field (see Cowan Letter, p. 4). We shall also deal briefly with two other matters raised in that letter. The first deals with the charge that WNBC-TV is not properly covering the air pollution issue because of its support from automobile and gasoline advertisers. There is no support for this charge. The one recent episode cited (the NBC Migrant Workers programs) is under study by the Commission, and further comment is inappropriate. We note, however, that the networks are to be commended for this type of broadcast (e.g., the CBS "Harvest of Shame"; the recent NBC Migrant Workers program). For, these programs typify the commitment to "robust, wide-open debate" upon which this nation depends. They do not constitute simply a measured, careful assessment of where other entities or public opinion are, but rather demonstrate a devotion to leadership—to breaking open forcefully, effectively, and fairly issues of great importance. It goes without saying that this

there remain wide areas for judgment by the licensee, based upon the facts of his particular area.

kind of effort is called for, whatever the effect on the broadcast media advertiser.

Second, the Cowan letter challenges the adequacy of the WNBC-TV efforts in this area of air pollution. But NBC submitted only an example showing in this area, and that showing does indicate significant coverage of the issue. In any event, this is an area which would be explored, upon appropriate complaint and showing, at renewal time, where the licensee could demonstrate its overall record in this respect—the discharge of his obligation to devote a reasonable amount of time to controversial issues. In short, this matter is not appropriately before us at this time, and we therefore restrict our ruling to the fairness doctrine issue presented.

On that issue, we hold that the licensee could reasonably reject the announcement approach sought by you, and that on the basis of the information presented, no further Commission action is warranted.

Commissioner Bartley concurring in the result; Commissioner Johnson dissenting and issuing a statement.

BY DIRECTION OF THE COMMISSION

/s, Ben F. Waple
Secretary

Dissenting Opinion of Commissioner Nicholas Johnson

"The automobile is our worst
polluter of the air."

—President Nixon
State of the Union (1970)

"Poetic License"

This license certifies
That Ron Padgett may tell
whatever lies
His heart desires
Until it expires

—Ron Padgett
Columbia University
Forum (Spring 1970)

This question today is a crucial one for American commercial television. Will we allow the little glass screen in our living rooms to go merrily on its way merchandising the machines and mechanisms that pour thousands of pounds of pure poison in our sky every day? Or will American television for once put fantasies aside, pull its head out of the smog, and put the most potent merchandising tool yet developed by man—the spot advertisement—to work in curing instead of creating, in addressing rather than avoiding, one of America's greatest social ills: Pollution.

I find it ironic, if not sad, that America can invest so much stock faith and rhetoric in the "magic" of the competitive marketplace of commerce, and yet ignore the "marketplace of ideas" (to use a phrase by Mr. Justice Holmes) by tolerating a monopoly used to merchandise Detroit's peculiar dreams of the appropriate automotive life-style—with all that life-style's attendant social ills. In perhaps one of the great advertising overkills of all time, Americans are being grossly oversold an automotive product and life-style they neither need nor may really want, and which may eventually kill them with its exhaust by-products. In effect, the Commission again rules that Americans have no right to talk back to their television sets—at least on this issue. I dissent.

I.

We begin with our cigarette decision, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921 (1969), and related court decisions, e.g., *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968). Using law and logic stemming from these rulings, the Friends of the Earth compellingly argue that the refusal of WNBC-TV, New York City, to provide Friends with an opportunity to present anti-pollution spot advertisements violates the Fairness Doctrine. The majority upholds WNBC's refusal. The flaw in the Commission's thinking is readily revealed in the simple way the majority occasionally refers to these complaints—as "anti-automobile/gasoline commercials." That is only a small part of the truth, a distorted part at that. Friends of the Earth are anti-pollution, not just anti-car or anti-gas, and that simple yet fundamental distinction should be born in mind in attempting to deal with all the arguments here.

The majority labors long and hard to distinguish cigarettes from other products, including detergents, tin cans, and gasoline engines. The argument rests on elaborate contentions that cigarettes are so unique the Fairness Doctrine cannot apply to other "product commercials." Before turning to a more detailed analysis of the majority's points, it is well to bear in mind former Commissioner Loevinger's view. In his concurring opinion in the cigarette case, Commissioner Loevinger pointed out that cigarette smoking and automobile pollution pose closely analogous issues. He said:

The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (para. 46), the normal use of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921, 954 (1967).

If the analogy was strong in 1967, it is far stronger today.

II.

So far as I can make out, the majority first argues that because cigarettes are a "unique" product, there are logical reasons for not extending the fairness doctrine to other products. Yet the logic of this position is clearly faulty. The question is not whether pollution of the lung differs from pollution of the air, or whether the products are manufactured or used differently, but whether advocacy of their use raises an issue of controversy and public importance sufficient to invoke the fairness doctrine. The majority's attempt to distinguish cigarettes from automobiles, therefore, is in fact a rather enormous *non sequitur*. There are no doubt many interesting differences between the two products, but so what? This fault in reasoning appears more clearly in the three points used by the majority to support its product distinction:

(1) "Cigarette smoking does not involve a balancing of competing interests. It is a habit—like snuff or chewing tobacco—which can fade away. . . ." Yet this is not true of other products, the majority maintains. First, it seems this argument is untrue. The nicotine in tobacco smoke creates in smokers a habitual and physical dependence on tobacco. Heavy smokers can "kick the habit," but it usually takes great effort of will. The anti-smoking announcements are designed to warn smokers and non-smokers of the dangers of addiction. Yet the contemporary American is wedded to automobile pollution by even stronger bonds of necessity and lack of choice. How could an individual "kick the pollution habit" if he wanted to? Most people depend on automobiles for transportation essential to their livelihood. Many might prefer to purchase pollution-free automobiles, but Detroit has simply not given them this choice. Individuals wanting to eliminate both air and lung pollution, therefore, could give up both cigarettes and automobiles. There are, after all, alternatives to automobiles—new rapid transit systems, subways, electric automobile

engines, bicycle riding, and plain old walking.¹ But that task is a difficult one. The issue here is whether the highway and oil lobbies we hear so much from on our television set will permit us to hear of the alternatives. Second, I fail to see the force of this argument. What difference does

¹For a timely, thorough analysis of just how distorted our national transportation priorities are, see Leavitt, *Superhighway-Superhoax* (1970). The book details the quiet scandal in the nation's Interstate Highway system, a scandal that has cost the nation dearly in the lagging development of alternative modes of transportation.

Consider this portion of a *Washington Post* editorial, titled "20 Billion a Year for Highways?":

On the Senate floor one day last month, Senator Randolph tossed off a piece of information that each member of Congress and each taxpayer ought to ponder for a while. "State highway officials, through their nationwide organization," he said, "estimate that the national highway needs for the next 15 years will cost \$320 billion."

We've gotten so used to talking about billions—a federal debt that approaches \$400 billion, a defense budget of around \$80 billion—that the size of this figure is hard to grasp. But \$320 billion is enough money for the government to buy all the railroads in the country, repair their roadbeds, fill all of their needs for new equipment, operate their passenger and commuter trains without charge to the riders for the next 15 years, and still have a big kitty left over. Looked at another way, \$320 billion is enough to buy every man, woman and child in the United States a new television set on each January 1 for the next 15 years. *Washington Post*, July 20, 1970, at A22, col. 1

Consider also this portion of a *New York Times* editorial, titled "How Livable the City?":

Perhaps the only thing absolutely clear in the recent smog was the idiocy of present priorities. Too much Federal revenue goes for war-related purposes, too little to meet domestic needs. Even in the nonmilitary sphere, there is distortion. The typical urban taxpayer—the father of two, making \$10,000 a year—paid \$19 for space exploration last year and only \$1 for mass transportation. This taxpayer paid \$26 for more Federal highways to accommodate more automobiles and only \$4 to fight pollution of both the air and water. *N. Y. Times*, August 4, 1970, at 28, col. 1.

it make if cigarettes involve "habits" and automobiles do not? The question before the Commission is whether advocacy of their use invokes the Fairness Doctrine. Pay-TV, for example, may be a controversial issue of public importance in certain areas, see, e.g., *The Spartan Radiocasting Co.*, 33 F.C.C. 765 (1962), yet it does not become so because it is "habit forming"!

(2) The majority appears to argue further that the Commission could consider (and has considered) a ban on all cigarette advertising, but no one would think of rolling back the technological revolution to "stop all use of autos and trucks." This argument is illogical, wrong, and a *non sequitur*. It is illogical because it improperly analogizes cigarette advertising with automobile use. The analogy, if there is one, is a possible ban on automobile advertising. Further, the argument in any event is wrong—for Friends of the Earth do not propose the elimination of either automobiles or automobile advertising. They merely claim their right to present a contrary view. Finally, the argument involves a *non sequitur*—for even if it were true that we could not ban the automobile (which it most certainly is not—particularly if the only alternative was death for the human race), we could certainly tolerate the view that our society is endangered by the automobile, and that we should work toward alternative forms of transportation.² The issue therefore, is the

²Banning automobiles, at least partially, is an idea not without merit. Environmental Action, the conservationist group that sponsored Earth Day last April, has suggested as much. Environmental Action has urged mayors of five major American cities (including New York City and Washington, D.C.) to ban cars from special "pollution-free" downtown areas. *Washington Post*, August 4, 1970, at A3, col. 1. Such a suggestion hardly seems radical when one considers the dangerous cesspool of air than hung over the entire Eastern Seaboard for several days in late July and early August 1970. "The bread we throw out on the water now returns to us," one newspaper editorialized. "It is true that abnormal weather in the form of a mess of warm air that won't move on is a major weave in the blanket of pollution now covering us. But we cannot blame the fickleness

freedom to express differing views on air pollution, not abolition of automobiles or their promotion. Friends of the Earth seek only to use the public airwaves to help the people get their sky back.

(3) The majority says the "focus should properly be on action, not the peripheral advertising aspect." Here again the majority attempts to deny the special, rather incredible impact of automobile spot advertising and its impetus to consumer "action" as a marketing tool. The majority contends that the anti-pollution drive has been sufficiently aired in regular news and public affairs programming. Yet the special effects of advertising cannot fairly be ignored. Advertising is hardly "peripheral." It is crucial. It has contributed enormously to our "automobile age," and is central to the problem at issue here.

There are a number of factors that should be weighed in determining whether a licensee has given "significant" coverage to various views. First, an important factor is the frequency and regularity of presentation. The Commission has explicitly recognized this factor in its decision, *Cigarette Advertising*, 9 F.C.C. 2d 921, 941 (1967):

We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine . . . For, while the Fairness Doctrine does not contemplate "equal time" if the presentation of one side of the issue is on a regular and continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issues.

of nature for this mess; it is manmade, largely by the exhaust fumes from automobiles and buses, according to local officials. *Washington Post*, July 30, 1970, at A20, col. 1.

In affirming this ruling, the U.S. Court of Appeals in *Banzhaf v. FCC*, 405 F.2d 1099 (D.C. Cir. 1968), was even more explicit:

In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media . . . inadequately inform the public of the extent to which its life and health are most probably in jeopardy. *The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood.* A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. [Emphasis supplied.]

Second, even if the licensee has satisfied the fairness doctrine under traditional analyses, I think we must recognize the unusually powerful impact of a spot advertising as compared to normal news coverage. Prepared spot announcements should be placed in a class by themselves—a proposition acknowledged by FCC Chairman Dean Burch with respect to political advertising. *Voters' Time*, Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, p. 15 (New York 1969); *Statement of Chairman Dean Burch*, Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, June 2, 1970. The spots in question invoke the familiar Madison Avenue techniques: the enticements of glamour and excitement ("Be a Big Rider!"); the allure of travel and faraway place; the invocation of an ethic of masculinity; pleasant surroundings often out of more usual contexts (by showing an automobile on a clean beach); and the reassuring appearances of well-known, pleasant-looking personalities to intone the blandishments prepared by the manipulation specialists. Petitioners seek only to present an alternative to the siren call of the oil and auto establishments. This the majority has refused them.

III.

The ultimate rationale for denying the complaints here is that, to use the majority's language, "the result would be the undermining of the present system [of American television], based as it is on the product commercials. Such a result is not consistent with the public interest." I cannot believe that the majority finds it more important to preserve the commercial broadcast system than *life itself* on our planet. Yet this may be the result of their action. Philip Slater has written in his recent book, *The Pursuit of Loneliness—American Culture at the Breaking Point*, that the "old culture" in America "tends to give preference to property rights over personal rights, technological requirements over human needs, . . . the producer over the consumer, [and] means over ends . . ." Nothing better places the Commission majority in the "old culture" than today's decision.

Once again, the majority has successfully seized and wrestled to the ground a phantom issue of its own creation. It's rationale, therefore, can hardly be taken seriously. Can anyone seriously believe that the presentation of a few anti-pollution spot advertisements will destroy the "American System of Broadcasting"? One would expect this argument from *Broadcasting* magazine and other trade publications, but not the Federal Communications Commission. After all, did anti-smoking commercials bring about the end of American commercial broadcasting? Of course not. (I sometimes suspect the broadcasting industry itself could ban all cigarette and automobile commercials, as well as a dozen other types, and still fund its entire operations on soap, deoderant and detergent commercials alone.) In any event, the majority has not show that the gravaman of its decision—preservation of "the present [television] system"—is even an issue here. We have no economic information whatsoever on the cost impact of anti-automobile advertisements. Without this, I must dismiss the majority's artificial fears as illusory.

We must not lose sight of what is fundamentally at issue here: whether our citizens should be told the *whole* truth about the products they use and consume. Is this not the bedrock of American competitive enterprise and consumer choice in the marketplace? How can such an un-American position be urged by an agency of our government? For an intelligent contemporary consumer to be free and independent (so the magic of the free enterprise marketplace can play its supposed role), the consumer must be fully informed on all aspects of his purchases.

American television's "copout" is apparent. Working hand in glove with the industrial machine it supports and by which it is supported, it shows us only half the commercial picture, and always the glamorous half. Where are the warts, the wrinkles? They, too, are an important part of reality. What the majority really says today is that our present system of commercial television depends for its livelihood on duping the American consumer into buying faulty products* he may not need, for reasons unrelated to their merits, that may indeed be literally killing them.

The majority argues that it is necessary for this Commission to keep its heavy hand out of programming decisions, and, in general, I agree. The majority would subject the broadcaster to review against the public interest standard only every three years at renewal time. But our system of commercial television must tell its consumers the *whole*

*The National Air Pollution Control Administration (NAPCA) has just learned from new testing procedures that new cars emit twice as much carbon monoxide and hydrocarbons as permitted by federal law. And according to Representative Paul Rogers, American consumers have paid roughly \$1.5 billion for pollution control systems on 30 million new cars (certified in compliance by the NAPCA) since 1967. Automobile commercials during those years, therefore, have been inherently deceptive, failing to warn consumers that the products advertised do not comply with federal law and do not effectively combat air pollution. See generally, *Washington Post*, July 15, 1970, p. A-2, cols. 1-2.

truth, not just a part of it. Otherwise, that FCC license to use the public's airwaves becomes like Ron Padgett's "Poetic License":

This license certifies
That Ron Padgett may tell whatever
lies
His heart desires
Until it expires

Is this what Congress intended the "public interest" to mean: is an FCC license to be a license to lie as much as desired until the license expires?

The truth is far more subtle than that. This Commission needs to relearn the First Amendment lessons Professor Thomas I. Emerson of Yale has been trying to teach:

Human judgment is a frail thing. It may err in being subject to emotion, prejudice or personal interest. It suffers from lack of information and insight, or inadequate thinking. It can seldom rest at the point any single person carries it, but must always remain incomplete and subject to further extension, refinement, rejection or modification. Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. Emerson, *Toward a General Theory of the First Amendment* 7 (Vintage Ed. 1963).

This fundamental truth the Commission today, once again, denies.

IV.

Finally, the unstated—or only partially articulated—premise from which the majority proceeds might be called the "Hit Parade" argument. It goes like this. If the Commission decrees that all licensees must carry programs dealing with pollution, persons holding strong views on many other issues inevitably will seek access to the Commission's "Hit

Parade," and the Commission will find itself in the unfortunate position of deciding which issues are important and which are not, thus assuming the very role of arbiter of programming which the Commission has always disclaimed.

It is important to recognize that what issues gain access to this list and why is basically beyond the Commission's powers. Who decides? The people do. The people decide through their proxies, the President, the Congress, and numerous public commissions and bodies that, as here, have defined what are today's "controversial issues of public importance". The majority itself cites much of this qualifying evidence. President Nixon, in his February 10, 1970 address to Congress, said pollution "is our most serious environmental problem." Witness also the Clean Air Act of 1965, supplemented by the Air Quality Act of 1967 and more recently by the National Environmental Policy Act of 1969 (NEPA), P.L. 91-190, 83 Stat. 852 (1970), which requires Federal agencies "to use all practicable means, consistent with other essential considerations of national policy . . ." to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." How can the FCC, austensibly a "federal agency," square today's decision with that Act?

The Commission turns aside the pleas of Friends of the Earth, the Environmental Protection Administration of New York City, and Citizens for Clean Air, Inc., three public interest groups who have filed some of the more thoughtful and impressively documented petitions ever received by this Commission. These groups see at stake here nothing less than the quality of life in contemporary America. The Commission's vision, through the smog it has helped create, is not as good. It is sad and somewhat disheartening that this Commission holds dearer the quantity of commercial profits than the quality of human life itself.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,556

FRIENDS OF THE EARTH, and
GARY A. SOUCIE,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

CITIZENS FOR CLEAN AIR, INC.,

Intervenor.

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONERS

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 9 1970

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(i)

TABLE OF CONTENTS

	<u>Page</u>
ISSUE PRESENTED FOR REVIEW	1
REFERENCES TO RULINGS	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Nature of the Case	3
B. Course of Proceedings and Disposition Below	4
C. Facts Relevant to the Issue Presented for Review	4
D. Ruling and Opinion of the Commission	10
ARGUMENT:	
I. The Commission Erred in Dismissing the Complaint which Alleged that WNBC-TV Was Not Complying with the Fairness Doctrine	14
A. The Commission's Opinion and Ruling, Without Explanation, Departed from the Court Approved Commission Procedures Heretofore Established in Fairness Doctrine Cases	15
1. The Regulatory Scheme Developed by the Commission for Application of the Fairness Doctrine Requires the Commission, in Evaluating a Complaint Against a Particular Broadcasting Station, To Consider Local Con- ditions in the Broadcaster's Community and the Licenses' Performance in Light of the Specific Programs Cited in the Complaint and the Needs of the Community Which the Station Serves	16
2. The Complaint Properly Challenged the Performance of Station WNBC-TV Under the Fairness Doctrine in Dealing with Pollution Issues Presented by Automobile and Gasoline Advertisements in the New York City area	20

(ii)

	<u>Page</u>
3. By Failing To Discuss the Specific Issues Presented by the Complaint, the Commission's Opinion Arbitrarily Ignored Its Own Settled Procedure in Fairness Doctrine Cases	23
a. The Commission erroneously failed to consider the complaint in the context of the New York City area	25
b. The Commission erroneously failed to consider either the general or the specific programs cited in the complaint	26
B. The Commission's Opinion Failed to Apply the Standards Heretofore Established by the Commission and the Courts for Deciding When the Fairness Doctrine Applies to Product Advertisements and Failed to Define Other Standards on Which Its Decision Was Based	29
1. This Court Has Held that in Determining Whether the Fairness Doctrine Is Applicable to Advertisements for a Particular Product, the Commission Must Be Guided by "Definable Standards" and Such Standards Have Been Developed by the Commission and the Courts	30
2. The Allegations in the Complaint Are Sufficiently Clear to Permit Application of the Standards Defined in Fairness Doctrine Cases	34
3. The Commission's Opinion, Although Apparently Conceding that the Complaint Met the Standards Previously Defined for Application of the Fairness Doctrine, Ignored Them in Dismissing the Complaint and Failed To Define any New Standards on Which the Decision Was Based	37
C. The National Environmental Policy Act Requires the Commission To Interpret and Administer the Fairness Doctrine To Counteract the Substantial	

(iii)

	<u>Page</u>
Adverse Environmental Impact of the Broadcast Advertisements Cited in the Complaint	39
CONCLUSION	47
ADDENDUM:	
Sub-sections 303(b), (g) and (r) and 307(a) and (d) of the Communications Act of 1934, 47 U.S.C. §§ 303(b), (g) and (r), 48 Stat. 1082, as amended, 47 U.S.C. §§ 307(a) and (d), 48 Stat. 1083-84	1 Add.
Part I of the Federal Communications Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Contro- versial Issues of Public Importance"	2 Add.
Title I of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., 83 Stat. 852	6 Add.

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*Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969)	12, 15, 16, 38

*Those cases preceded by an asterisk are those cases chiefly relied upon.

	<u>Page</u>
*Retail Store Employees Union v. F.C.C., — U.S. — App. —, F.2d —, — (No. 22605, Oct. 27, 1970) (slip opinion)	16, 23, 29, 33, 34, 46
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Clean Air Act of 1965, 42 U.S.C. § 1857 et seq., 81 Stat. 485 (as amended, 1967)	35
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National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., 83 Stat. 852	<i>passim</i>
Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335, 84 Stat. 89	11
<i>Other Authorities:</i>	
U.S. Congress:	
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115 Cong. Rec. S. 12127	42
Federal Communications Commission:	
Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (1964)	<i>passim</i>
*Applicability of The Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967)	<i>passim</i>
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	<u>Page</u>
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Letter of September 18, 1968, to Honorable Oren Harris, F.C.C. 63-851	17
Obligations of Broadcast Licensees Under the Fairness Doctrine, Notice of Proposed Rule Making, F.R. Doc. 70-6292, n. 9., 35 Fed. Reg. 7820 (1970).....	17, 18
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Developments in the Law: Deceptive Advertising, 80 Harv. L. Rev. 1005, 1010 (1967)	43
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Nixon, Press Release, October 26, 1970	35
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	<u>Page</u>
Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 Colum. L. Rev. 612, 648-49 (1970)	40
Taplan, Advertising, A New Approach (1960), p. 30	43
United States Public Health Service, Air Quality Criteria for Carbon Monoxide (1970)	8

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,556

FRIENDS OF THE EARTH, and
GARY A. SOUCIE,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

CITIZENS FOR CLEAN AIR, INC.,

Intervenor.

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONERS

ISSUE PRESENTED FOR REVIEW

Was it reversible error for the Federal Communications Commission to decline to take action on Petitioners' complaint alleging that the Federal Communications Act, as interpreted by the Commission's cigarette advertising ruling and by other opinions and orders by the Commission and

the courts interpreting the Fairness Doctrine, requires that the Commission hold that automobile and gasoline advertisements generally and advertisements for high-powered automobiles and leaded gasolines in particular, broadcast by WNBC-TV present one side of a controversial issue of public importance in the New York City Area, which must be balanced by programming presenting other viewpoints on that issue, where the Commission

(a) failed to follow its own procedures for handling Fairness Doctrine cases and gave no reasons for dismissing the specific complaint against WNBC-TV;

(b) enunciated, instead, a general ruling, not requested or required by the complaint, which explained the reasons why the Commission "would not extend the [cigarette] ruling generally to the field of product advertising" throughout the United States (App. 83);

(c) failed to follow the substantive standards of law which the Commission and this Court have carefully developed for determining the applicability of the Fairness Doctrine to product advertisements, and failed to explain what alternative standards guided the Commission's decision in this case; and

(d) failed to comply with the provision of the National Environmental Policy Act of 1969 which "authorizes and directs" each agency, "to the fullest extent possible," to interpret and administer the laws of the United States so as to insure that each person is fully informed of the ways in which he can fulfill his "responsibility to contribute to the preservation and enhancement of the environment."

This case has not previously been before this Court.

REFERENCES TO RULINGS

The order and opinion of the Federal Communications Commission presented for review in this case is dated August 5, 1970, and is printed in full at pages 73 to 88 of the Appendix (separately bound) to this Brief.

STATUTES AND REGULATIONS INVOLVED

Sub-sections 303(b), (g) and (r) and 307(a) and (d) of the Communications Act of 1934, 47 U.S.C. §§ 303(b), (g) and (r), 48 Stat. 1082, as amended, 47 U.S.C. §§ 307(a) and (d), 48 Stat. 1083-84; Part I of the Federal Communications Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance"; and, Title I of the National Environmental Policy Act of 1969, 83 Stat. 852, are attached as an Addendum to this Brief.

STATEMENT OF THE CASE

A. Nature of the Case

This is a petition for review of an order of the Federal Communications Commission dismissing without hearing or oral argument a Fairness Doctrine complaint filed with the Federal Communications Commission against station WNBC-TV of New York City. The station is owned and operated by National Broadcasting Company, Inc.

The complaint was filed on March 14, 1970, by Gary Soucie and Friends of the Earth. Mr. Soucie is a New York City resident and Executive Director of Friends of the Earth (App. 11). Friends of the Earth (herein sometimes called "FOE") is a national environmental organization with its headquarters in New York City. It is devoted to the preservation of the environment (App. 11).

In sum, the complaint alleged that the station's advertisements for automobiles and gasoline raised a controversial issue of public importance and hence required the station to make a fair presentation of opposing viewpoints (App. 10).

B. Course of Proceedings and Disposition Below

Following the filing of the complaint, to which were attached the letter of complaint sent by the petitioners to WNBC-TV and the station's reply,¹ two letters in support of the complaint were filed with the Commission. One was filed by the Environmental Protection Administration of the City of New York (App. 27-39). It is an agency of the Government of the City of New York with overall responsibility for matters affecting the environment. The other filing was by Citizens for Clean Air, Inc., a tax-exempt New York corporation with several thousand members, organized to educate residents of the greater New York metropolitan area to the hazards of air pollution and effective means of alleviating it (App. 41-43).² In addition, letters supplementing the complaint were filed by counsel for the petitioners (App. 20-21, 22-57, 56-65).

On August 5, 1970, the Commission filed a lengthy opinion (summarized below at pp. 10-13) dismissing the complaint (App. 1-10). Commissioner Johnson filed a dissenting statement (App. 89-99).

C. Facts Relevant to the Issue Presented for Review

Since the Commission decided the case without holding a hearing or making findings of fact, the facts alleged in the complaint and supporting documents are summarized in this section of the Statement.

¹On October 20, 1970, National Broadcasting Company, Inc., owner of WNBC-TV, filed a motion for leave to intervene in the proceedings in this Court.

²By order dated October 8, 1970, this Court granted the motion of Citizens for Clean Air, Inc., to intervene in the proceedings in this Court.

The Complaint. Attached to the complaint was a copy of a letter dated February 6, 1970, sent to WNBC-TV by complainants (App. 11-16). The letter alleged that many automobile and gasoline advertisements broadcast by WNBC-TV present one side of a controversy over an issue of major public importance in the New York City area (App. 11). It alleged that the issue involves a product which meets all of the standards established by the Commission and this Court for treatment under the Fairness Doctrine (App. 12), and that advertisements for automobiles and gasolines constitute propaganda in favor of the use of automobiles (particularly of large and powerful cars requiring high octane gasoline) "which are generally described as efficient, clean, socially responsible, and automotively necessary" (App. 11). The letter cited five advertisements, presenting the dates and times when they were broadcast over WNBC-TV (App. 15).

After listing the five specific standards which it said this Court identified in *Banzhaf v. F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), as the criteria which distinguish a product whose advertisements should be treated under the Fairness Doctrine (App. 12), the letter quoted from official government reports to demonstrate that "[a]ll of these elements are present in the case of automobile and gasoline pollution" (App. 12). Complainants' letter concluded by asking WNBC-TV to "make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy" (App. 14).

There was also attached to the complaint a copy of WNBC-TV's response, dated February 18, 1970, in which the station rejected complainants' premise that it should treat advertisements for automobiles and gasoline as programming presenting one side of the controversy over the use of polluting automobiles (App. 17-20). The station's letter presented three arguments: (1) the cigarette advertising ruling was explicitly limited to cigarettes; (2) since there is "little, if any, controversy that transportation by automo-

bile should continue, advertisements for automobiles and gasoline do not present a discussion of the antipollution issue"; and, (3) the station has adequately covered "[t]he issue of air pollution, including the causes and effects of automobile emissions" (App. 19).

After referring to the above correspondence, the complaint made three allegations. First, it alleged that the test established by the Commission in its opinion on the *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C.2d 921, 943 (1967) is whether the product's

"[n]ormal use has been found by Congressional and other Governmental action to pose such a serious threat to general public health that advertising promoting such use would raise a controversial issue of public importance . . ."

The complaint marshalled evidence to demonstrate that polluting automobiles meet all aspects of this test (App. 3-6).

Second, the complaint alleged that "advertisements for automobiles and gasoline—and especially for cars with large-displacement engines and for gasoline with a lead additive—generally convey a message which supports one side of the controversial automobile air pollution issue" (App. 6). The complaint referred to the public efforts in New York City to stop drivers from using high-powered cars and leaded gasolines and, using specific examples, it alleged that "[a]dvertisements which extol the virtues of leaded gasolines or large-engine cars necessarily argue for the other side of this debate" (App. 7).

Third, the complaint alleged that WNBC-TV's occasional news programs or panel discussions involving the air pollution issue did not meet the station's obligation to balance the effects of repeated advertisements—and were not intended to do so (App. 8-10).

The complaint concluded with the following prayer:

"We therefore formally complain that WNBC-TV has broadcast and appears to be continuing to broadcast a large number of messages presenting only one side

of a controversial issue of public importance, and that they have refused a proper and reasonable request to make corresponding free time available for messages presenting contrasting viewpoints. We specifically request that this complaint be investigated and that necessary and appropriate action be taken to bring WNBC-TV into compliance with the requirements of the Federal Communications Act." (App. 10)

Letters Supplementing and Supporting the Complaint. On April 7, 1970, James Moorman, an attorney for Friends of the Earth, sent the Commission a letter calling attention to the provisions of the National Environmental Policy Act (herein sometimes called "NEPA"), particularly Section 102 of that Act which provides:

"... to the fullest extent possible ... the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."³

The letter contended that NEPA requires the Commission to interpret "public interest" provisions of the Communications Act so as to extend the cigarette advertising ruling to cover advertisements for automobiles and gasoline (App. 22-26).

On June 20, 1970, the Environmental Protection Administration filed a lengthy letter with the Federal Communications Commission expressing "strong support for the position taken by Friends of the Earth in its March 14, 1970 complaint against WNBC-TV" (App. 27). The letter first reviewed the reasons why New York City was vitally interested in the application of the Fairness Doctrine to automobiles and gasoline advertising. It alleged that automobiles contribute almost 60% of the total air pollution in New York City, citing statistics to support its allegation (App. 29-31).

³42 U.S.C. §4332, 83 Stat. 853. The text of Title I of NEPA is reproduced in the Addendum to the brief at 6-10 Add.

Because the Environmental Protection Administration is a local governmental agency, officially concerned with the polluting effects of automobiles and gasoline in New York, we quote at length from the scientific studies to which it called the Commission's attention in its letter:

"Automobiles are responsible for most of the 1.5 million tons of the potentially lethal carbon monoxide dispersed each year in the New York atmosphere. See Scientists Committee for Public Information, Inc., *Air Pollution in the Queens, Midtown and Brooklyn-Battery Tunnels*. Whereas levels of 10 ppm (parts per million) for an eight-hour period is the standard set by the Federal Government as the threshold for adverse health effects (See United States Public Health Service, *Air Quality Criteria for Carbon Monoxide* (1970), reports have been received of carbon monoxide average concentrations of 70 ppm in central Manhattan traffic (New York City Department of Air Pollution Control, *Carbon Monoxide and Air Pollution from Automobile Emissions in New York City*, p. 2 (1967)), and well over 100 ppm during periods of peak congestion at certain bridges and tunnels. See *Report on Carbon Monoxide Instrumentation in the Tunnels of the Tri-borough Bridge and Tunnel Authority*, p. 15 (November, 1969). In addition, automobiles emit 569 tons of hydrocarbons and 106 tons of oxides of nitrogen daily (New York City Department of Air Resources, *Carbon Monoxide and Air Pollution from Automobile Emissions in New York City*, p. 2 (1967)) as well as large amounts of particulate matter, oxidants, ozone, and an undetermined amount of asbestos. Most gasolines are leaded, resulting in additional toxic emissions. The deleterious effects of this barrage of pollutants are discussed below in Section II of this letter.

The 1969 supplement to the *Mayor's Task Force on Air Pollution* reported that the two million automobiles operating in New York City—more than half of them in Manhattan—were twice as many as the

area should sustain. It further warned that 'pollution from automobiles and trucks has been steadily increasing and has cut into the other gains scored in the war against environmental poisoning.' *Supplement to 1966 Report of the Mayor's Task Force on Air Pollution*, p. 6 (October, 1969)" (App. 29-30).

The Environmental Protection Administration then urged upon the Federal Communications Commission the desirability of a program of encouraging purchase of "smaller engined automobiles and curtailment of the unnecessary use and purchase of cars" (App. 31). It said that such a program was not apt to be successful

"... unless the advocates of stringent anti-pollution measures are given sufficient access to the media. The New York City government needs local public support for its local efforts at pollution abatement, ... " (App. 31).

The Environmental Protection Administration alleged that gasoline advertisements also contribute to air pollution, stating:

"A basic thrust of gasoline advertising is to suggest the importance and enjoyment of driving by emphasizing the need for a gasoline with qualities such as high mileage, and extra power. Gasoline advertisements typically depict driving as a pleasurable activity essential to the good life. Accordingly, in measuring the amount of time devoted to commercial advertising of automobiles, it would be misleading not to include the time allotted to gasoline commercials." (App. 37)⁴

⁴By letter dated July 13, 1970, NBC responded to the letter of the Environmental Protection Administration, reiterating that it did "not regard the content of the commercials broadcast by WNBC-TV which advertise automobiles or gasoline to be a discussion of the pollution issue" and again stating that "WNBC-TV has presented many programs and announcements which do express the anti-pollution point of view" (App. 44). The letter attached what it called "a partial list of such programs" which it cited as proof that "the public has not been 'left uninformed' of the anti-pollution viewpoint" (App. 45).

Citizens for Clean Air, Inc. filed a letter in support of the complaint (App. 40). Its letter concluded as follows:

"If it is not as clear to the Commission as it is to us . . . that the relief sought by FOE should be granted, then we urge the Commission to conduct hearings for the purpose of developing facts adequate to resolve the serious questions which have been raised.

In the event that further proceedings are held by the Commission, CCA wishes to present testimony . . ." (App. 43).

By letter dated July 30, 1970, Mr. Geoffrey Cowan, counsel for Friends of the Earth, informed the Commission that in late July 1970 the City of New York had barred automobiles from operating in certain areas of Manhattan, that the Mayor had asked the public to avoid all non-essential driving and had suggested use of car pools and public transportation (App. 57-59).

D. Ruling and Opinion of the Commission

On August 7, 1970, the Commission dismissed the complaint. The initial portion of the Commission's letter-opinion summarized the contents of the file, and concluded:

"We have reviewed the arguments presented and conclude that although no action is warranted against WNBC, a full statement of our position would be helpful to broadcasters and the public alike" (App. 77).

Most of the Commission's explanation for dismissing the complaint centers on a discussion of the ways in which "cigarettes are distinguishable" from automobiles (App. 79). In its statement, the Commission first discussed its prior opinion on the *Applicability of the Fairness Doctrine to Cigarette Advertising, supra*, and the related court decision, *Banzhaf v. F.C.C., supra*. The Commission emphasized that in that opinion it had relied on the fact that although "the normal

use of cigarettes had been found by the Government to be a hazard to health," broadcasters were "urging people to smoke" (App. 78). The Commission then turned to the reasons why it believed "that cigarettes are distinguishable" from automobiles, leaded gasoline, etc. It found that there were "a number of grounds that really coalesce," as follows:

(i) Cigarette smoking does not involve a balancing of competing interests but "is a habit . . . which can fade away . . . which the Government for health reasons is urging people . . . to stop at once. That is not true of the other products" (App. 79).

(ii) Congress has banned cigarette advertising from television⁵ but "[n]o one proposes to stop" using automobiles (App. 79).

(iii) ". . . the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising aspect" (App. 80).

After citing "several approaches besides the one urged here by complainants" to the solution of the pollution problem, the Commission stated that cigarette and automobile and gasoline commercials are not "really the same"; that if they were, "we would be proposing to ban promotion of these high-powered automobiles or leaded gasoline, since that is our stated view as to cigarettes" (App. 82).

The Commission felt that its "conclusion on the complaint now before us is clear" (App. 82). The opinion continued:

"There is the threshold issue whether these commercials . . . present one side of a controversial issue in this complex field. Further, complainant *in effect* calls for ascertainment of the number of commercials promoting high-powered cars, the number promoting the smaller cars, the number and nature of

⁵ Congress had not enacted such legislation on September 15, 1967, the date of the Commission's cigarette advertising opinion. See Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335, 84 Stat. 89, signed by the President, April 1, 1970.

the programs dealing with the issue of air pollution stemming from the gasoline engine automobile, and then a judgment whether the *difference in time*, as between the large and small cars, is sufficiently great to call for the presentation of further time to the side which the complainant espouses. *We have no such information before us*, but we decline in any event to extend the cigarette advertising ruling to these other products." [Emphasis added.] (App. 82-83).

Although this passage from the opinion appears to dispose of the complaint, the Commission considered the question whether, "even assuming we were wrong in that belief [that cigarettes are a unique product] we would not extend the ruling generally to the field of product advertising" (App. 83). Although complainants never asked for such a ruling, the Commission's opinion asserts that "that is what, in effect, complainant urges since, as stated, a great many products have some adverse ecological effects" (App. 83). Such a ruling, the Commission stated, would result in "the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest" (App. 83).

The Commission then stated that while stations need not treat advertisements for automobiles and gasoline as controversial issues requiring a presentation of opposing viewpoints, they do have an obligation to broadcast some minimum amount of information on environmental issues. The Commission insisted that its imposition of this obligation effectuated the policy of the National Environmental Policy Act of 1969 and comported with the principles enunciated by the Supreme Court in *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367 (1969). The Commission concluded that "it is *Red Lion*—not the cigarette advertising ruling—which should be followed here as the best means of fulfilling our obligations under the [National Environmental Policy] Act" (App. 84).

Whether or not WNBC-TV is adequately fulfilling its obligations, said the Commission, will "be explored, upon appropriate complaint and showing, at renewal time." That question, the Commission said, "is not appropriately before us at this time and we therefore restrict our ruling to the fairness doctrine issue presented" (App. 88). The opinion concluded:

"On that issue we hold that the licensee could reasonably reject the announcement approach sought by you, and that on the basis of the information presented, no further Commission action is warranted.

Commissioner Bartley concurring in the result; Commissioner Johnson dissenting and issuing a statement" (App. 88).

Commissioner Johnson's Dissent. Commissioner Johnson's dissenting statement took the position that the issue presented by Friends of the Earth's complaint concerning automobiles and gasoline was not distinguishable from the Commission's prior decision on the *Applicability of the Fairness Doctrine to Cigarette Advertising* (9 F.C.C.2d 921 (1967)). In his view, the majority misconceived the question which, he said:

"... is not whether pollution of the lung differs from pollution of the air, or whether the products are manufactured or used differently, but whether advocacy of their use raises an issue of controversy and public importance sufficient to invoke the fairness doctrine" (App. 91).

ARGUMENT

I. THE COMMISSION ERRED IN DISMISSING THE COMPLAINT WHICH ALLEGED THAT WNBC-TV WAS NOT COMPLYING WITH THE FAIRNESS DOCTRINE.

The Commission erred in dismissing this Fairness Doctrine complaint against WNBC-TV. Without explanation, the Commission totally abandoned its own settled procedures and its carefully defined standards for handling Fairness Doctrine complaints. Rather than examining the specific programs cited in the complaint in the context of the community where the station operates, as the statutory scheme underlying the Doctrine requires, the Commission dismissed the complaint with several pages of comments about the applicability of the Fairness Doctrine to product advertising generally. There is no statutory basis for the Commission's conclusions. Its opinion ignored the statutory standards for judging the applicability of the Fairness Doctrine to product advertising heretofore developed by the Commission itself and by this Court. Finally, we submit that the Commission misinterpreted the National Environmental Policy Act of 1969⁶ when it held that the Act did not require that the relief prayed for in the complaint be granted.

We submit, for the reasons stated below, that the Federal Communications Act and prior decisions of the Commission and of this Court support the conclusion that the advertisements of WNBC-TV cited in the complaint present one side of a controversial issue of public importance in the New York City area, and that this case should be remanded to the Commission for further proceedings not inconsistent with that conclusion.

⁶42 U.S.C. §§4321, *et seq.*, 83 Stat. 852.

A. The Commission's Opinion and Ruling, Without Explanation, Departed from the Court Approved Commission Procedures Heretofore Established in Fairness Doctrine Cases.

Since the early days of the Federal Radio Commission, the Fairness Doctrine has been a cornerstone of the American system of broadcasting,⁷ reaffirmed in legislation,⁸ in major court decisions,⁹ and in countless decisions by the Federal Communications Commission.¹⁰ The Doctrine has become the primary ingredient of the Commission's common law interpretation of "the public interest"—the device by which the broadcast responsibilities of all licensees are rationally developed, step by step, in decisions which have the force of precedent and are subject to judicial review.¹¹

Because of the Doctrine's singular importance to American broadcasting, procedural and substantive aspects of the Doctrine have become settled law, repeatedly confirmed by the Commission and by the courts. While the Commission

⁷For a brief history of the Fairness Doctrine, see *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 375-386 (1969).

⁸See 47 U.S.C. §315.

⁹E.g., *Red Lion Broadcasting Co., Inc. v. F.C.C.*, *supra*; *Banzhaf v. F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969).

¹⁰See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 9 FCC 2d 921 (1967).

¹¹As this Court pointed out in *Banzhaf v. F.C.C.*, *supra*, 132 U.S. App. D.C. at 27, 405 F.2d at 1095:

"The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review."

undoubtedly has the power to reverse itself in those areas where authority has been delegated to it by Congress, such reversals cannot be unreasonable or arbitrary and must be explained in opinions which clearly present the Commission's rationale.¹²

1. *The regulatory scheme developed by the Commission for application of the Fairness Doctrine requires the Commission, in evaluating a complaint against a particular broadcasting station, to consider local conditions in the broadcaster's community and the licensee's performance in light of the specific programs cited in the complaint and the needs of the community which the station serves.*

The Fairness Doctrine has its roots in the Communications Act requirement that each broadcaster holds his license for only so long as he continues to serve "the public interest, convenience, and necessity."¹³ Since each complaint alleging violation of the Doctrine raises the question whether a particular licensee is fulfilling his statutory obligation, in each ruling the Commission necessarily must apply

¹²*Retail Store Employees Union v. F.C.C.*, ___ U.S. App. D.C. ___ F.2d ___, ___ (No. 22605, Oct. 27, 1970) (slip opinion at 20-23); *Melody Music, Inc. v. F.C.C.*, 120 U.S. App. D.C. 241, 243-44, 345 F.2d 730, 732-33 (D.C. Cir. 1965). See also, *Sunbeam Television Corp. v. F.C.C.*, 100 U.S. App. D.C. 82, 84, 243 F.2d 26, 28 (D.C. Cir. 1957); *Pinellas Broadcasting Co. v. F.C.C.*, 97 U.S. App. D.C. 236, 238, 230 F.2d 204, 206 (D.C. Cir. 1956); *Secretary of Agriculture v. United States*, 347 U.S. 645, 654, 74 (1954); *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 449, 510-11 (1935).

¹³47 U.S.C. §307(d), 312(a)(2); See, *Red Lion Broadcasting Co., Inc. v. F.C.C.*, *supra*, pp. 373, 380; *Banzhaf v. F.C.C.*, *supra*, 132 U.S. App. D.C. at 25, 405 F.2d at 1093; *Retail Store Employees Union v. F.C.C.*, *supra*, slip opinion at 16-18.

the Fairness Doctrine to the performance of a particular licensee.¹⁴

So important to the statutory scheme is the application of the Fairness Doctrine that the Commission, for the benefit of broadcasters and the public, promulgated, in 1964, a document entitled "*Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*."¹⁵ This publication, developed pursuant to an extensive study by the Commission,¹⁶ is commonly known and will hereinafter be referred to as the "Fairness Primer."¹⁷ In the Fairness Primer, the Commission has taken care to point out that "the Commission's rulings are necessarily based upon the facts of the particular case presented."¹⁸

There are two principal reasons for the Commission's case-by-case approach. First, as the Commission recently noted, it has generally felt that "we should proceed, one step at a time in this sensitive area."¹⁹ But more important, that approach is a part of the regulatory scheme by which the Commission evaluates the extent to which each

¹⁴See Letter of September 18, 1968, to Honorable Oren Harris, F.C.C. 63-851.

¹⁵Fairness Primer, 29 Fed. Reg. 10416 (1964). (2-6 Add.)

¹⁶See *Broadcast Licensees Advised Concerning Stations' Responsibilities Under the Fairness Doctrine as to Controversial Issue Programming*, F.C.C. 63-734 (1963).

¹⁷The relevant portion of the Fairness Primer is reprinted in the Addendum to this brief, at 2-6 Add.

¹⁸Fairness Primer, 29 Fed. Reg. 10416 (1964), 5 Add. The Commission goes on to emphasize that:

"... a variation in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rules for guidance, look not only to the language of the ruling but the specific factual context in which it was made." (*Ibid*)

¹⁹*Obligations of Broadcast Licensees Under the Fairness Doctrine*, Notice of Proposed Rule Making, F.R. Doc. 70-6292, 35 Fed. Reg. 7820 (1970), n. 9.

licensee is fulfilling its statutory obligation to serve the public interest. As a result, much of the information which the Commission takes into account in ruling on a fairness complaint necessarily varies from community to community, from program to program, and from station to station.

In evaluating every fairness complaint, the Commission must first determine whether "the complaint sets forth sufficient facts to warrant further consideration."²⁰ The threshold question here is whether the complaint cites a program or programs whose subject is "controversial and of public importance."²¹ *not ad*

From the outset, the Commission has emphasized that conditions in the local community are central to the test both of controversiality and of public importance. The Commission made this point particularly clear in a passage in *In the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949), para. 6, (hereinafter referred to as "Editorializing Report"), which is often quoted as the origin of the modern Fairness Doctrine:

²⁰ Fairness Primer, 29 Fed. Reg. 10416, 5 Add.

²¹ *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 FCC 2d 921, 946 (1967). In the Fairness Primer, *supra*, Part IIA, the first subheading in Commission rulings, presents cases which discuss "controversial issue of public importance." If the Commission determines that the programs cited in the complaint present one side of an issue which is both controversial and of public importance "in the community served by the particular station," it must then decide whether the station has "acted reasonably and in good faith" in presenting other viewpoints on the issue. Before making this decision, the Fairness Primer promises:

"[f]ull opportunity is given to the licensee to set out all programs which he has presented, or plans to present, with respect to the issue in question during an appropriate time period." 29 Fed. Reg. 10416, 5-6 Add.

Then the Commission takes action, on the basis of all the information it has received about the station's performance.

"The Commission has . . . recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to . . . discussion of *public issues of interest in the community served by the particular station*. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection *the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community* [footnote omitted]. It is this right of the public to be informed, rather than any right of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting." [Emphasis supplied.] ²²

Both the Commission and this Court have also emphasized that each decision must be made on the basis of the specific programs challenged and the licensee's specific efforts to present opposing views. As this Court stated in *Hale and Wharton v. F.C.C.*, ____ U.S. App. D.C. ____, ____, 425 F.2d 556, 558 (D.C. Cir. 1970):

"To establish a violation of [the Fairness Doctrine], appellants must show that specific programs have dealt with controversial issues partially, and, if so, that other programs on the station have not balanced the coverage by presenting the alternative viewpoints."

To insure that the Commission can easily evaluate the merits of a fairness complaint involving specific programs

²²The Fairness Primer pointed out that "the basic administrative action with respect to the Fairness Doctrine was taken in the Commission's 1949 Report, *Editorializing by Broadcast Licensees*." (29 Fed. Reg. 10416, 2-3 Add.) Recently, the Commission called the *Editorializing Report*, the Fairness Doctrine's "definitive policy statement." *Obligations of Broadcast Licensees Under the Fairness Doctrine*, *supra*, F.R. Doc. 70-6292, 35 Fed. Reg. 7820.

broadcast by a specific station in a specific community, the Fairness Primer insists that each complaint "submit specific information indicating: (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station has afforded, or plans to afford an opportunity for the presentation of contrasting viewpoints."²³ 29 Fed. Reg. 10416, 5 Add.

This Court quoted those criteria in full in *Hale and Wharton v. F.C.C.*, *supra*, p. 558, to illustrate that "proof of a [Fairness Doctrine] violation must be based on quite specific facts."

2. *The complaint properly challenged the performance of Station WNBC-TV under the Fairness Doctrine in dealing with pollution issues presented by automobile and gasoline advertisements in the New York City area.*

The complaint was filed by Gary A. Soucie, Executive Director of Friends of the Earth, whose headquarters are in New York City (App. 11). The complaint subsequently was supported by the two organizations most concerned with air pollution in the New York City area. On June 22, a letter of support was filed by The Environmental Protection Administration (EPA), the New York City governmental agency with overall responsibility for environmental matters (App. 27-38). Shortly thereafter, Citizens for Clean Air (CCA), a tax-exempt New York membership corporation, organized in 1965 for the purpose of educating residents of the greater New York Metropolitan Area to the hazards of air pollution and the effective means of alleviating it, sent

²³ A footnote in the Fairness Primer points out that "complainant can usually obtain this information by communicating with the station." (*Ibid.*)

the Commission a lengthy telegram supporting the complaint (App. 41-43). Friends of the Earth, EPA and CCA all alleged that automobile pollution is a matter of public importance and major concern to New York City area residents. Their letters amply described the pollution crisis in the area and detailed the contribution that automobiles are making to that crisis (App. 5, 27-28, 29-31, 41-42, 57-59, 66-71). The letters also set forth respects in which advertisements for automobiles and gasoline present only one side of an issue which is highly controversial in the New York Area (App. 6-10, 11, 15, 21, 28, 37, 42).

The complaint against WNBC-TV properly followed the procedures set forth in the Fairness Primer for lodging a fairness complaint, and, we submit, "set forth sufficient facts to warrant further consideration."²⁴

(1) The complaint cited New York station WNBC-TV as "the particular station involved."

(2) The complaint described "the particular issue of a controversial nature discussed over the air." Most automobile and gasoline ads, it stated:

"imply that the good life is somehow connected with the use of powerful cars with large-displacement engines and high-test gasolines" (App. 7).

Other advertisements, on WNBC-TV, it stated:

"imply that automobiles are consonant with an unpolluted environment . . . while others are more direct and portray the oil industry as a champion of environmental purity . . ." (App. 8).

These implications, the complaint alleges, are at odds with the position taken by New York public officials and environmental leaders who urge people to walk, use mass transportation or form car pools, rather than drive (App. 7, 13, 31, 37, 42, 57, 58, 66-67, 68, 72), and who urge all those who feel they must drive to use small cars and non-leaded gasoline (App. 6, 7, 14, 30-31, 37).

²⁴ See Fairness Primer, 29 Fed. Reg. 10416, 5 Add.

(3) The complaint listed "the date and time when the program was carried." Specifically, the complaint listed five advertisements stressing the virtues of large-displacement engines and high-test leaded gasoline (App. 15), and described the content of three other advertisements which presented one side of the issue (App. 11).

(4) As a basis for the claim that WNBC-TV "has presented only one side of the question," the complaint examined the programs listed in WNBC-TV's letters and alleged that they "fall far short of the Commission's 'good faith' requirement" (App. 9). Complainants pointed out that practically none of the station's programs "presented even the most cursory discussion of automobile pollution," (App. 59) and that on most of those programs which did discuss the subject "industry's position was apparently more than adequately represented" (App. 9).

(5) As the Fairness Primer suggests, complainants relied on WNBC-TV's own comments to answer "whether the station had afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints." In its letter to Mr. Soucie, the station made it clear it did not plan to balance automobile or gasoline advertisements with contrasting viewpoints since it said, "we do not regard the content of commercials broadcast by WNBC-TV which advertise automobiles or gasolines to be a discussion of the pollution issue" (App. 44).²⁵

²⁵The station also asserted that "references in advertisements to 'performance' or 'size' of automobiles or to gasolines being good for 'cold weather' are not, in our opinion, a discussion of a pollution problem." The station further contended that "there is little, if any, controversy that transportation by automobile should continue" (App. 19).

3. *By failing to discuss the specific issues presented by the complaint, the Commission's opinion arbitrarily ignored its own settled procedure in Fairness Doctrine cases.*

Just last month, this Court had occasion to remind the Federal Communications Commission that:

"... the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They 'should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent.'"²⁶

We suggest that if the Commission had studied this matter more thoroughly or set it down for hearing or for oral argument, it would have avoided the many misinterpretations of the complaint made in the opinion below.²⁷

²⁶*Retail Store Employees Union v. F.C.C.*, *supra*, slip opinion at 11. The quotation in this Court's opinion is from its earlier opinion in *Midwestern Gas Transmission Co. v. F.P.C.*, 103 U.S. App. D.C. 360, 368, 258 F.2d 660, 668 (1958).

²⁷This Court's opinion in the *Retail Store Employees Union* case, *supra*, also calls into question the Commission's treatment of complainants' allegation that the fear of economic reprisal by automobile and gasoline advertisers may inhibit WNBC-TV's forthright presentation of information about automobile pollution (App. 60-63). The Commission dismissed the allegation out of hand with the statement that "there is no support for this charge" (App. 87-88). Yet complainants presented evidence of three recent instances of advertiser pressure on WNBC-TV and its parent company, NBC (App. 61). The Commission's opinion only referred to one of these episodes, a program on migrant workers and, as to that case, it stated that the matter "is under study by the Commission and further comment is inappropriate" (App. 87). Nothing appears in the record to indicate that the Commission made any effort to investigate the merits of complainants' allegation.

In the *Retail Store Employees Union* case, *supra*, the union charged that radio station WREO in Ashtabula, Ohio, had stopped carrying the union's advertisements as a result of economic pressure brought to bear on the station by a local department store. The union's evidence was totally circumstantial, and its charges were dismissed by the Commission on the basis of an exchange of letters between the Commission

The Commission described its ruling as "a full statement of our position" which, it said, will "be helpful to broadcasters and the public alike" (App. 77). "We shall first discuss the pertinent background factors" it promised, "and then the particular complaint here" (App. 78).

Unhappily, the Commission never did discuss "the particular complaint here." Rather than discussing the public issues raised in the context of the community area served by WNBC-TV, the Commission discussed the issues solely in a national context. Rather than discussing the air pollution issues raised by the kinds of automobile and gasoline advertisements cited in the complaint, the Commission discussed the issues raised by advertisements for all products which present serious environmental problems. Rather than discussing the controversial issues presented in the numerous advertisements specifically described and cited, the Commission discussed—or, more accurately, briefly dismissed—a few other advertisements for automobiles and gasoline which were not among those cited in the complaint.

and the station. This Court sent the matter back to the Commission for further treatment, explaining that it was convinced that "on the present record something more than summary treatment of the union's allegations was required." (Slip opinion at 12.) The court quoted *Clarksburg Publishing Co. v. F.C.C.*, 96 U.S.App.D.C. 211, 215, 225 F.2d 511, 515 (D.C. Cir. 1955), in which this Court stated that "the inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant."

- a. The Commission erroneously failed to consider the complaint in the context of the New York City area.

The Commission's entire analysis of the automobile air pollution problem focused on the national stage. In delineating the "public issues of interest in the community served by the particular station," and in considering "the different attitudes and viewpoints . . . held by the various groups which make up the community," the Commission totally failed to consider the situation in the New York City area or the attitudes of leading groups in that region (App. 37). As a result, the Commission reached a number of conclusions—which evidently served as a basis for its decision—which might or might not be accurate for the nation as a whole, but which clearly are inapplicable to the New York City area.

Most importantly, the Commission apparently concluded that unlike cigarette advertisements, automobile advertisements as a whole raise no controversial issue since, it stated: "[T]he Government is not urging people to stop *now*—without any delay—buying or using gasoline-engine automobiles . . ." (App. 79).²⁸ At one point in its opinion the Commission reiterated this conclusion in even more sweeping terms. It said: "no one proposes . . . to stop all use of autos . . ." (App. 79). These are national findings, not local ones, as the Commission acknowledges when, in a footnote to this section of its opinion, it points to a possible local limitation to this conclusion. "[W]e recognize that, because of weather conditions or other factors," it states, "there may be governmental strictures on the use of automobiles in major cities"

²⁸This conclusion echoes and presumably supports the position taken by WNBC-TV in its letter to Soucie, that:

" . . . there is little, if any, controversy that transportation by automobile should continue. The advertising of automobiles cannot therefore be a discussion of the anti-pollution issue." (App. 19).

(App. 79). Yet the record was filled with references to statements by Mayor Lindsay and other public officials, urging drivers in New York City, where possible, to stop using cars at once—to walk or form car pools or use mass transit instead (App. 7, 28, 31, 37, 42, 57-58, 68-69). Moreover, one of the supporting letters in this case was filed by the City's leading environmental control officer, who specifically emphasized the need for such restraints in New York City (App. 28, 30-31). The Commission, by focusing on the national picture, failed to take account of these highly significant local circumstances.

- b. The Commission erroneously failed to consider either the general or the specific programs cited in the complaint.

Although the complaint was clearly limited to one form of programming—*i.e.*, automobile and gasoline commercials—the Commission's opinion, in describing its reasoning, invariably meshes those commercials with advertisements for other products which can damage the environment. For most of the opinion the mesh is so complete that the various program subjects become indistinguishable. Thus, the Commission stated that:

“... we would not extend the ruling generally to the field of product advertising. That is what, in effect, complainant urges since, as stated, a great many products have some adverse ecological effects” (App. 83).

The other products which the Commission specifically includes in this mix are detergents (particularly with phosphates), electric power, airplanes, and disposable containers (App. 78).

By blending all of these commercials together the Commission makes a mockery of the Fairness Doctrine. The complaint was explicitly limited to products which produce automobile air pollution because in the context of the New York City area those products—and those products alone—meet the standards established by the Commission's cigarette

ruling as affirmed by this Court—viz. that the product's "normal use has been found by Congressional and other governmental actions to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance" ²⁹

The complaint did not raise the question as to whether this standard should also apply to detergents, electric power, airplanes, or disposable containers. For purposes of analysis of a fairness complaint, we submit that the Commission should have treated the advertisements which were the subject of the complaint as a particular program series, just as it has in the past treated complaints against other forms of programs on other subjects. As the Commission has stated:

"In determining compliance with the fairness doctrine the Commission looks to substance rather than label or form. It is immaterial whether a particular program . . . is a paid announcement, official speech, editorial or religious broadcast. Regardless of label or form, if one viewpoint of a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other viewpoint or viewpoints." ³⁰

When the Commission did discuss automobile and gasoline advertisements in its opinion, it did not discuss the advertisements cited in the complaint. A good description of the advertisements cited was presented in the Commission's introductory summary of the record, as follows:

" . . . auto and gas advertisements (particularly those for large-displacement engines and lead additive gas-

²⁹ *Applicability of Fairness Doctrine to Cigarette Advertising*, 9 F.C.C.2d 921 (1967), 943, *aff'd sub nom. Banzhaf v. F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968).

³⁰ *Broadcast Licensees Advised Concerning Stations' Responsibilities Under the Fairness Doctrine as to Controversial Programming*, *supra*, p. 17, n. 16.

olines) generally convey a message that such products (and necessarily the pollution they cause) are a requirement for the full rich life. The automobile commercials extol the virtues of large car size, 'be a big rider,' '4-barrel V-8' engines and 'up to 429 cubic inches' and imply that automobiles are consonant with an unpolluted environment (e.g., by showing an automobile on a clean beach), thus, it is argued, representing one side of a controversial issue of public importance . . ." (App. 75).

Yet, in the course of its opinion, on the two occasions when the Commission specifically discussed automobile and gasoline advertisements, it relied upon commercials which were not cited in the complaint. Thus, the opinion said:

"[T]he threshold issue [is] whether these commercials, which are essentially advertising slogans, such as 'Dodge Rebellion' or 'Ford has a better idea', 'Quick start in cold weather', or 'put a tiger in your tank' present one side of a controversial issue" (App. 82).

Later in the opinion the Commission said:

"We wish to emphasize that our ruling is restricted to the general product advertisement (e.g. 'Join the Dodge Rebellion,' 'Put a Tiger in Your Tank,' etc.). Obviously a commercial could deal directly with an issue of public importance; if so, the fairness doctrine is fully applicable" (App. 84).

The complaint had specifically cited five advertisements and had described three others as characteristic of the commercials which present one side of the issue (App. 15). But of the four advertisements listed by the Commission in the first passage quoted above only one was among the advertisements either cited or referred to in the complaint, and neither of those listed in the second passage quoted above was mentioned in the complaint.

Evidently the Commission never dealt directly with the facts presented by the complainants. Specific advertise-

ments, which complainants argued present one side of an important and controversial public issue, were ignored; instead, the opinion dealt with what it lightly dismissed as "advertising slogans" and "general product advertisements." Nor did the Commission ever endeavor "to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, [and which] may reasonably be thought greater than the impact of the written word."³¹

B. The Commission's Opinion Failed to Apply the Standards Heretofore Established by the Commission and the Courts for Deciding When the Fairness Doctrine Applies to Product Advertisements and Failed to Define Other Standards on Which Its Decision was Based.

Not only did the Commission fail to follow its own procedures in considering the complaint, we submit, but, in determining the applicability of the Fairness Doctrine, it committed the further error of failing to apply the clear statutory standards that it had defined in *Applicability of the Fairness Doctrine to Cigarette Advertising, supra*, and that this Court made even more explicit on review in *Banzhaf v. F.C.C., supra*.

The courts have emphasized that, in determining whether the Fairness Doctrine is applicable to advertisements for a particular product, the Commission must adhere to a coherent set of principles. It is not to act as a *cadi* dispensing justice while sitting under a tree without regard to definable standards adopted and enunciated in previous rulings.³² Yet, we submit, that is precisely what the Commission did in its opinion in this case. Instead of judging this complaint on the basis of the specific standards spelled out in the

³¹ *Banzhaf v. F.C.C., supra*, 132 U.S. App. D.C. at 32-33, 405 F.2d at 1100-01. See also *Retail Store Employees Union v. F.C.C., supra* at 18-19.

³² See n. 12, *supra*, p. 16.

Cigarette Advertising ruling and in this Court's opinion in the *Banzhaf* case, the Commission dismissed the complaint and decided that the Fairness Doctrine is not applicable on the basis of a new and confusing conglomeration of considerations which hardly qualify as standards and whose statutory origins are never explained.

1. This Court has Held that In Determining Whether the Fairness Doctrine is Applicable to Advertisements for a Particular Product, the Commission Must be Guided by "Definable Standards" and Such Standards have been Developed by the Commission and the Courts.

In *Banzhaf v. F.C.C.*, *supra*, this Court made it clear that in order to prevent arbitrary Commission judgments which could tread on broadcasters' First Amendment rights, the Commission's decisions on the applicability of the Fairness Doctrine to advertisements for a particular product must be guided by clear and definable standards and cannot simply be left to administrative discretion. This Court stated (132 U.S. App. D.C. at 28, 405 F.2d at 1096) that it could not uphold the Commission's decision to apply the Fairness Doctrine to cigarette advertising "merely on the ground that it may reasonably be thought to serve the public interest." The Court said:

"[T]here is a high risk that [public interest rulings related to specific program content] will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." [Footnote omitted.] (*Ibid.*)

The Commission's ruling in *Applicability of the Fairness Doctrine to Cigarette Advertising*, *supra*, also emphasized that its holding was dictated by statutory standards and was not simply a matter of administrative discretion. The Commission stated:

"[W]e believe that *the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising* (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined at license renewal time It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception." [Emphasis added.] (9 F.C.C. 2d at 927).

The Commission's standards were made explicit in order to meet the objection of petitioners who "assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broad-scale effect on broadcast operations and the presentation of advertising by radio generally."³³ In response, the Commission defined clear and restrictive standards, based on the Communications Act.³⁴

"Our ruling does not state," the Commission explained, "that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were two-fold:

- (1) Governmental and private reports and Congressional action with respect to cigarettes, and
- (2) their assertion in common that 'normal use of this product can be a hazard to the health of millions of persons'."³⁵

³³ *Applicability of the Fairness Doctrine to Cigarette Advertising*, *supra*, at 942.

³⁴ *Id.* at 943.

³⁵ *Applicability of the Fairness Doctrine to Cigarette Advertising*, *supra*, at 943.

This Court, in affirming the Commission's ruling, defined even narrower standards based on the "public interest" requirement of the Communications Act. First, after reviewing the Act's statutory history, the Court concluded that the statutory standard certainly includes public health. It stated:

"Whatever else it may mean, however, we think the public interest indisputably includes the public health The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends." [Footnote omitted.] (*Banzhaf v. F.C.C.*, *supra*, 132 U.S. App. D.C. at 28-29, 405 F.2d at 1096-97).

While this Court believed that the public health standard removed much of the vagueness and overbreadth attending the standard of public interest, it was "not prepared to say that the Commission was authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health." (*Banzhaf v. F.C.C.*, *supra*, 132 U.S. App. D.C. at 29; 405 F.2d at 1097). It therefore identified five standards which, when combined, constitute the kind of public interest issue which requires the application of the Fairness Doctrine. These were, as applied to cigarettes:

- [1] "The danger cigarettes may pose to health is, among others, a danger to life itself.
- [2] . . . it is a danger inherent in the normal use of the product, not one merely associated with its abuse or depending on intervening fortuitous events.
- [3] It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group.
- [4] Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence.

- [5] Finally, the Commission expressly refused to rely on any scientific expertise of its own. Instead, it took the word of the Surgeon General's Advisory Committee, whose findings had already been adopted in substance by the Department of Health, Education and Welfare, the Federal Trade Commission, and the Senate Commerce Committee, and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act." [*Banzhaf v. F.C.C.*, *supra*, 132 U.S. App. D.C. at 29-30; 405 F.2d at 1907-98]

Both the Commission and this Court recognized the possibility that other products besides cigarettes might fall under the criteria set down above, thereby requiring the extension of the Fairness Doctrine to those products as well. The Commission said that as of the date of its decision, September 15, 1967, it knew of no other product that met its criteria and that "instances of the extension of the ruling to other products upon consideration of future complaints would be rare." (*Applicability of the Fairness Doctrine to Cigarette Advertising*, *supra*, at 943). On appeal, this Court implied that the strict public health standards which it set down would preclude widespread extension of the cigarette ruling to other products,³⁶ but this Court never suggested that advertisements for other products could not meet appropriate Fairness Doctrine standards.

This Court's recent opinion in the *Retail Store Employees Union* case, *supra*, involved the question whether a department store's radio advertisements urging the public to buy goods at the store, while a union was urging the public to boycott the store, raised a controversial issue of public importance. We submit that this opinion constitutes a ruling by this Court that in addition to cigarette commercials, general product advertising may or may not raise controversial issues of public importance, depending upon the subject of the

³⁶ *Banzhaf v. F.C.C.*, *supra*, 132 U.S. App. D.C. at 31; 405 F.2d at 1099.

commercial and the setting in which it is broadcast. The opinion rejects the approach of the Commission (App. 82) that general product commercials (other than cigarette commercials) do not raise controversial issues of public importance. The opinion states:

"And although the Commission repeatedly emphasized that its holding in that [cigarette advertising] case . . . was limited to cigarette advertising, the reasons advanced by the Commission to support that limitation seem to us not to imply that other advertisements may not carry an implicit as well as an explicit message, but rather that the implicit and explicit messages normally carried by advertising do not concern controversial issues of public importance." [*Retail Store Employees Union v. F.C.C.*, *supra*, slip opinion at 20-21]

2. *The Allegations in the Complaint are Sufficiently Clear to Permit Application of the Standards Defined in Fairness Doctrine Cases.*

The data about automobile air pollution in New York City gathered and documented in the complaint and supporting letters in this case meet the Commission's criteria set forth in its *Cigarette Advertising* opinion, and the even stricter criteria set down by this Court in *Banzhaf*, in defining the products to which the Fairness Doctrine should be applied.

First, the letters are replete with references to governmental and private reports describing the danger to health created by automobile and gasoline air pollution, which account for over 60% of the total air pollution in New York City (App. 29). The reports were issued by authorities ranging from the U.S. Surgeon General to Mayor Lindsay's Task Force on Air Pollution. The letter from Jerome Kretchmer of the New York City Environmental Protection Administration referred the Commission to twelve governmental and private reports on the dangers of automobile air pollution, six of which specifically concerned New York City (App. 29-35; *supra*, pp. 8-9).

Second, there has been considerable governmental action in regard to the automobile air pollution problem. As the complaint alleged, the Clean Air Act of 1965, which was supplemented by the Air Quality Act of 1967, was passed in part specifically to regulate the exhaust emission from automobiles (App. 4).³⁷ Further, the Kretchmer letter emphasizes that the Federal policy behind two recent enactments, the Environmental Quality Improvement Act of 1970 and the National Environmental Policy Act of 1969, includes both the development and dissemination of information concerning pollution and the encouragement of efforts by members of the public, to confront the problem, a policy which presupposes a public which is knowledgeable on the pollution issue (App. 35). See *infra*, pp. 43-44.

In addition, letters supplementing the complaint stated that the Government of the City of New York has itself acted to curb the community's acute automobile air pollution problem (App. 6, 33, 66-67, 68-70). There have been several government-sponsored studies of the effects of automobile air pollution in the City of New York and the means of countering the problem, some of which specifically focus

³⁷On October 26, 1970, in an action which tends to confirm the allegations which complainants made about the public importance of the controversy over gasolines with lead additives, President Nixon announced that:

"At my request, the Administrator of General Services today issued the attached regulation which requires that federally-owned vehicles use low-lead or unleaded gasoline whenever this is practical and feasible. The purposes of this regulation are two-fold: to reduce air pollution and to increase the market for low-lead and unleaded gasoline, in order to make such fuels more generally available.

I have also today written to the Governors of our fifty States suggesting that they take similar steps in their Administrations. If all government agencies—Federal, State, and local—were to adopt this policy, we could not only reduce pollution, but we could also provide a sizeable incentive for production and distribution of low or unleaded fuels and thus make them more readily available."

on the problems caused by television advertising (App. 6-10, 13, 14, 33, 41); the city government has initiated important programs of its own³⁸ and leading public officials, including Mayor Lindsay, have urged individual action by each potential New York driver, requesting, for example, the use of car pools and public transportation (App. 6, 57, 58, 68).

To meet the test of the FCC's ruling in *Applicability of the Fairness Doctrine to Cigarette Advertising*, the complaint specifically alleged that the governmental and private reports and the Congressional action with respect to automobile pollution, assert in common that the "normal use of the[se] product[s] can be a hazard to the health of millions of people" (App. 4-7, 12).

The complaint specifically addressed itself to the five criteria set forth by this Court in *Banzhaf v. F.C.C.*, *supra*, and argued that "[a]ll of these elements are present in the case of automobile and gasoline pollution" (App. 12). The complaint cited numerous government and other reports to demonstrate that (1) automobile pollution poses a danger to life itself; (*e.g.*, App. 13) (2) the danger is inherent in the normal use of the product (*e.g.*, App. 68); (3) the danger threatens a substantial body of the population; (*e.g.*, App. 35) (4) the danger, though not established beyond all doubt, is documented by the compelling cumulation of statistical evidence; (*e.g.*, App. 42) and, (5) the dangers have been documented in authoritative government reports whose findings have been adopted in substance by several departments of government and by Congress. (*e.g.*, App. 35-36).

³⁸Mayor Lindsay has recently announced his intention to ban cars altogether from certain parts of Manhattan. Also, the New York City Council will consider a ban on the sale of leaded gasoline in the City of New York (App. 31).

3. *The Commission's Opinion, Although Apparently Conceding that the Complaint Met the Standards Previously Defined for Application of the Fairness Doctrine, Ignored Them in Dismissing the Complaint and Failed to Define any New Standards on Which the Decision was Based.*

The Commission's opinion in this case appears to concede that the products discussed in the advertisements cited in the complaint meet all of the standards defined in the *Cigarette Advertising* ruling and in *Banzhaf v. F.C.C.* Most of the standards are not discussed at all; one is casually mentioned—but not examined—in a footnote (App. 79). Instead, the Commission presents some reasons for distinguishing cigarettes from automobiles and gasoline, but the Commission's reasoning provides no new or coherent set of standards and relies on considerations whose statutory basis is unclear and unexplained.

We will attempt here to summarize the arguments set forth in an opinion which, we concede, we have never satisfactorily been able to parse. The principal consideration troubling the Commission appears to be the complexity of the issues raised by those characteristics of the product which are controversial and of public importance. The Commission explained that the cigarette case did not involve the "balancing of competing interests" (App. 79) present in the automobile air pollution case, since automobiles and gasoline present "benefits and detriments of a more complex nature" which do not permit the "simplistic approach taken as to cigarettes" (App. 83).

In support of its statement that the "complex" nature of the issue raised by gasoline and automobile advertising did not permit the "simplistic" approach taken as to cigarettes, the Commission made the following assertions: (1) the Government is not urging people to stop buying or using gasoline-engines, whereas it is urging people not to smoke cigarettes (App. 79); (2) no one proposes to stop promoting or using the "fruits of the technological revolu-

tion," whereas the promotion and use of cigarettes are being curtailed (App. 79); (3) there are more effective ways to fight automobile air pollution than the proposed anti-pollution presentations, whatever form they may take (App. 80); and, (4) air pollution comes from various sources and any connection between various diseases and automobile air pollution is more tenuous than the relationship between cigarette smoking and disease (App. 81).

The Commission never clearly defined the standards which determine its ruling; nor did it explain their statutory origins. Based on past Commission and court decisions, for example, one would expect the public interest to require that a licensee present more, rather than less information about a complex issue. And the political and scientific judgments underlying (3) and (4) above would appear to contradict the view of the relevant governmental bodies on matters where the Commission had neither the competence nor the power to formulate an independent position. In short, the Commission appears to have fashioned the kind of "idiosyncratic" ruling which the Supreme Court cautioned against in *Red Lion Broadcasting Co., Inc. v. F.C.C.*, *supra*. Answering the contention that the Fairness Doctrine is unconstitutionally vague, the Court in that case stated that:

"... we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech." *Id.* at 395.

As this Court said in the *Banzhaf* case, *supra*, 132 U.S. App. D.C. at 28, 405 F.2d at 1096, the First Amendment demands that administrative action in this area be "narrowed by definable standards." This the Commission's present opinion plainly fails to do.

C. The National Environmental Policy Act Requires the Commission To Interpret and Administer the Fairness Doctrine To Counteract the Substantial Adverse Environmental Impact of the Broadcast Advertisements Cited in the Complaint.

The National Environmental Policy Act of 1969³⁹ codified, in the most forceful language possible, Congress' crisis-level concern with America's rapidly deteriorating environment. In Title I of the Act, and specifically in § 101(a)-(c), Congress adopted a "Declaration of National Environmental Policy." In § 102 Congress

"... authorize[d] and direct[ed] that, *to the fullest extent possible*, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [Title I of] this Act" [Emphasis added]

In its opinion in this case, the Commission recognized some of the responsibilities placed upon it by NEPA, and quoted the language from § 102 cited above (App. 84). The Commission, however, by reading § 101 too narrowly and by misconstruing the issues raised by the complaint, failed to take into account all of the requirements of NEPA and misconstrued the statutory scheme of the Act. Thus, early in its opinion the Commission stated:

"... the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising aspect. . . .

This brings us to the gravamen of the complaint here—that the public should be informed of the issue, as a predicate for action by elected officials" (App. 80).

These conclusions are plainly erroneous. In the first place, the Commission apparently decided as a matter of law, without any supporting evidence in the record before

³⁹42 U.S.C. §4331, 83 Stat. 852. Title I of the Act is reprinted at 6-10 Add.

it and without citation of a single authority, that the United States should solve its automobile pollution problem exclusively through action dealing with the product rather than undertaking action concerning the advertising of the product as well. The Commission's conclusion in this respect flies in the face of § 102 of NEPA, quoted *supra*, p. 39. We submit that this provision of the Act requires the Commission to do all it can within its area of statutory responsibility to combat environmental pollution,⁴⁰ not to decide that some other agency can do it better or that only some of the tools which the Commission has at its command should be employed. Section 102 of NEPA forbids an agency from making a policy decision that some of the tools available to it for fighting pollution ought not to be used because other means, not available to the agency, would produce better results.

In the second place, the passage from the Commission's opinion quoted above plainly misconstrued the "gravamen" of the complaint as asking the Commission to compel broadcasts for the purpose of persuading listeners to have elected officials take action against automobile pollution. On the contrary, the complaint sought Commission action to compel presentation of views on all aspects of the automobile pollution problem, including non-legislative means

⁴⁰The phrase "to the fullest extent possible" was added to the language of § 102 in conference for the purpose of assuring that no Federal agencies avoided compliance with the Act through an "excessively narrow construction of its existing statutory authorizations." Conference Report (H. Rep. No. 91-765) on S. 1075, Dec. 17, 1969, H. 12635, 91st Cong., 1st Sess. At the same time, the conferees agreed to delete a House amendment which provided that "nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal official, or agency created by any other provision of law." (*Id.*) The obvious inference to be made from this deletion is that the Act is intended to "increase, decrease or change" the ways in which Federal officials construe their responsibilities under other provisions of law. See Sive, "Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law," 70 Colum. L. Rev. 612, 648-49 (1970).

of alleviating the problem in New York. Thus the complaint plainly alleged in Section 2:

"There are several aspects of the fight to rid the air of automobile pollution. The effort will require both individual restraint and governmental action. In the short run, those who are asking for new steps to limit air pollution are asking drivers to buy small-engine cars and non-leaded gasoline. For the longer haul they are demanding new legislation, stricter law enforcement by government administrators, and major voluntary changes by the automobile and oil industries." (App. 6)

The Commission stated in its opinion that "[l]icensees must devote a reasonable amount of time to [environmental] issues, as a most important part of their obligation to operate in the public interest" (App. 80). Later the Commission elaborated on this requirement, explaining that each broadcaster has "an obligation to inform the public to a substantial extent on these important issues, including prime time periods" (App. 86). However, the Commission specifically stated that this new programming requirement is not related to the level of product advertising (App. 86). Thus, the obligation to offer programming which presents information about automobile pollution would be the same for a station which broadcasts no automobile or gasoline advertisements as for a station which each night presents a dozen of the kinds of advertisements cited in the complaint; and the new programs would presumably present the views of the automobile industry as well as those of environmentalists.

It is apparent from the opinion that the Commission reached this conclusion because it assumed that the policy of NEPA is solely concerned with governmental action. The Commission totally failed to take account of § 101(c), another relevant section of the Declaration of National Environmental Policy. That section states that:

"The Congress recognizes that each person should enjoy a healthful environment and that each person

has a responsibility to contribute to the preservation and enhancement of the environment" (7 Add.).

The legislative history of § 101(c) illuminates the reasons for its inclusion in the Act. In adopting it, Congress relied upon studies prepared by experts in the environmental problems facing the nation. Portions of these reports were included in the *Congressional Record* during the debates. These reports indicate that Congress had in mind the fact that there could be no solution to the environmental problem without intensive education of each citizen concerning the causes of the degradation of the environment and the action required by each individual citizen to help remove those causes. The framers of the Act were also conscious of the psychological barriers to individual action. These concerns were well stated in a special report commissioned by the Senate Committee on Interior and Insular Affairs and titled "A National Policy for the Environment". On October 8, 1969, Senator Henry Jackson, Chairman of the Committee and chief sponsor of NEPA, presented the bill to the Senate and reprinted the report in full in the *Congressional Record* as a cornerstone of the Act's legislative history. The report explained that:

"Control by governments, by international organizations, or by other institutions cannot feasibly be extended to every aspect of the environment nor to more than a fraction of the actual points of impact of individual man upon his environment. *Policy effectiveness consequently depends very largely upon the internalization, in the human individual, of those understandings, values, and attitudes that will guide his conduct* in relation to his environment along generally beneficial lines. A major requisite of effective environmental policy is therefore intelligent and informed individual self-control. [Emphasis added]⁴¹

⁴¹ 115 Cong. Rec. S. 12127 (1969).

The policy of the Act, therefore, recognizes the necessity to create an intelligent and informed populace, capable of individual self-control.

In no small part, the values and attitudes of Americans are the evolving product of the world which advertisers present on television. The complaint suggested that many advertisements for automobiles and gasoline broadcast by WNBC-TV effectively reinforce values and attitudes antithetical to the objectives of NEPA. As Mr. Soucie stated in his letter to WNBC, "these ads implied that the good life is somehow inexorably connected with the use of powerful cars with large-displacement engines and high-test leaded gasoline" (App. 15). Mayor Lindsay's Task Force on Air Pollution, after an extensive study, also concluded that the city's air pollution problem was greatly exacerbated by such appeals. It said

"The best way to cut down on dangerous hydrocarbons in the air is to cut down on horsepower. Yet Detroit continues to glamorize and sell engines far more powerful than are functionally necessary or consistent with individual and public safety" (App. 8).

The Commission does not challenge these assertions and, in view of the overwhelming number of studies which document the social appeal of advertising campaigns,⁴² it is difficult to imagine how the Commission could do so. NEPA requires the Commission to help insure that the public is effectively informed of the other side of this issue. It is clear that in enacting § 101(c) of NEPA, Congress recognized that the effectiveness of the Act heavily depended

⁴² See, e.g., Jones, *The Cultural and Social Impact of Advertising on American Society*, 8 Osgoode Hall L.J. 65, 72 (1970) and the studies cited therein, especially FTC Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1969 (cited at p. 70); *Developments in the Law: Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1010 (1967); Taplan, *Advertising, A New Approach* (1960), p. 30; Packard, *The Hidden Persuaders* (1957); see also, Commissioner Johnson's dissent in this case at App. 95.

upon educating each individual citizen to exercise intelligent and informed individual self-control. Clearly, the individual must be informed of the ways in which he can better the environment before he can be expected to fulfill his responsibility under NEPA. One cannot contribute to the solution of a problem which he does not understand. For this reason, § 101(c) must be read in conjunction with § 102(2)(F) of the Act, which provides in pertinent part:

"Sec. 102. The Congress authorizes and directs that, *to the fullest extent possible*: . . . (2) *all agencies of the Federal Government shall—*

* * *

(F) make available to States, counties, municipalities, institutions, and *individuals*, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;" [Emphasis supplied] (7-9 Add.).

Read as a whole, Title I of the National Environmental Policy Act, obligates the Federal Communications Commission (1) to recognize the public interest in preserving the environment as a paramount consideration in its licensing procedures and (2) specifically, to use its licensing power as a means of making available to "individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."

As both the Commission and the court found in the cigarette case, in the face of a massive advertising campaign an occasional interview or news documentary will not accomplish the task.⁴³ In *Banzhaf v. F.C.C.*, *supra*, this Court pointed out that:

⁴³The Commission recently reaffirmed this principle in *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 297 (1970):

"The critical consideration thus becomes: Are reasonable opportunities afforded when there has been an extensive but roughly balanced presentation on each side [of the Vietnam issue in normal news and public affairs programming] and *five opportunities in prime time for the leading spokesman*

"The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred 'yeses' for each 'no', when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed." [132 U.S. App. D.C. at 31, 405 F.2d at 1099].

Moreover, the Fairness Doctrine rests on the "right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee, or any individual member of the public to broadcast his own views on any matter."⁴⁴ Consequently, a broadcaster does not meet his Fairness Doctrine or NEPA obligations merely by providing air time to those who espouse a particular point of view. While the licensee properly determines the format and scheduling of programs which the Fairness Doctrine requires him to present,⁴⁵ the licensee must make a

of one side to address the nation on this issue? We believe that in such circumstances there must also be a reasonable opportunity for the other side geared specifically to the five addresses."

⁴⁴Editorializing Report, 13 FCC 1246 (1949). In the *Red Lion* opinion, *supra*, at pp. 390-92, the Supreme Court emphasized that this right of the public to be informed is the essence of the First Amendment.

⁴⁵The Commission expressed concern in its opinion in this case that "were we to adopt a scheme of announcements tracking in a significant ratio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials" (App. 83). Complainants made it clear that their complaint was based on the Commission's *Cigarette Advertising* opinion and ruling, *supra* (App. 1), in which the Commission said that its ruling did not require "a licensee to treat the issue through presentation of spot messages" (9 F.C.C. 2d at 944). The Commission also said:

"We have no reason to think, and petitioners have proffered nothing concrete in support of their claim that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement . . . so as not to preclude or curtail presentation by stations

good faith effort to provide programming designed to reach the relevant audience. His programming decisions should be calculated to reach those members of the public who are likely to have seen the programs presenting the other side of the controversial issue. The Commission has held that within the reasonable limits of a broadcaster's resources these considerations properly influence the time during which a program should be broadcast (e.g., prime time) and the frequency with which the information is presented.⁴⁶ "While the Fairness Doctrine does not contemplate 'equal time,'" the Commission pointed out in its *Cigarette Advertising* ruling, *supra*, at p. 941:

"... if the presentation of one side of an issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of this issue."

As this Court recently pointed out in *Retail Store Employees Union v. FCC*, *supra*:

"Since not all of a station's audience is normally listening to broadcasts at any one time, repetition increases the likelihood that a given message will be heard by any individual, and may also increase its impact on those hearing the message more times than one." (Slip opinion at 19, n. 61.)

We recognize that the Commission is given broad discretion by the courts in determining how best to utilize its statutory powers and responsibilities. We submit, however, in ruling on the complaint in the case at bar, the Commission failed to recognize its appropriate role in educating individuals to the environmental problem and, accordingly, failed to adhere to the requirements of the National Environmental Policy Act. The Commission erroneously assumed

of cigarette advertising that they choose to carry." (9 F.C.C. 2d at 921, 944).

⁴⁶ See, e.g., *Times-Mirror*, F.C.C. 62-1130, in Fairness Primer, *supra*, 29 Fed. Reg. at 10421 (1964).

that the "gravamen" of the complaint was directed primarily to compelling broadcasts dealing with the automobile pollution problem "as a predicate for action by elected officials" (App. 80), rather than also as a predicate for informed individual action by each citizen pursuant to the obligations imposed on each American by Section 101(c) of the National Environmental Policy Act.

CONCLUSION

For all the reasons stated herein, Petitioners respectfully request the following relief:

(a) that the Court reverse the Commission's holding that the automobile and gasoline advertisements alleged in the complaint to have been broadcast by WNBC-TV do not present one side of a controversial issue in the New York City Area which must be balanced by programming presenting other viewpoints on that issue;

(b) that the Federal Communications Commission's dismissal of the complaint be reversed; and

(c) that the case be remanded to the Commission for further proceedings not inconsistent with the above.

Respectfully submitted,

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November 9, 1970



1 Add.

ADDENDUM

SECTION 47 U.S.C. 303(b), (g) AND
(r) (in part) OF THE COMMUNICATIONS
ACT OF 1934, 48 STAT. 1082

Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter

SECTION 47 U.S.C. 307(a) AND
(d) (in part) OF THE COMMUNICATIONS
ACT OF 1934, 48 STAT. 1083

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted

2 Add.

may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby

PART I OF THE FEDERAL COMMUNICATIONS COMMISSION'S PUBLIC NOTICE OF JULY 1, 1964

APPLICABILITY OF THE FAIRNESS DOCTRINE IN THE HANDLING OF CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE

Part I—Introduction

It is the purpose of this Public Notice to advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of such licensees under the Commission's "fairness doctrine", which is applicable in any case in which broadcast facilities are used for the discussion of a controversial issue of public importance. For this purpose, we have set out a digest of the Commission's interpretative rulings on the fairness doctrine. This Notice will be revised at appropriate intervals to reflect new rulings in this area. In this way, we hope to keep the broadcaster and the public informed of pertinent Commission determinations on the fairness doctrine, and thus reduce the number of these cases required to be referred to the Commission for resolution. Before turning to the digest of the rulings, we believe some brief introductory discussion of the fairness doctrine is desirable.

The basic administrative action with respect to the fairness doctrine was taken in the Commission's 1949 Report,

3 Add.

Editorializing by Broadcast Licensees, 13 FCC 1246; Vol. 1, Part 3, R.R. 91-201.¹ This report is attached hereto because it still constitutes the Commission's basic policy in this field.²

Congress recognized this policy in 1959. In amending Section 315 so as to exempt appearances by legally qualified candidates on certain news-type programs from the "equal opportunities" provision, it was stated in the statute that such action should not be construed as relieving broadcasters "* * *" from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Public Law 86-274, approved September 14, 1959, 73 Stat. 557).³ The legislative history⁴ establishes that this provision "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rept. No. 1069, 86th Cong., 1st Sess., p. 5).

While Section 315 thus embodies both the "equal opportunities" requirement and the fairness doctrine, they apply

¹Citations in "R.R." refer to Pike & Fischer, Radio Regulations. The above report thus deals not only with the question of editorializing but also the requirements of the fairness doctrine.

²The report (par. 6) also points up the responsibility of broadcast licensees to devote a reasonable amount of their broadcast time to the presentation of programs dealing with the discussion of controversial issues of public importance. See Appendix A.

³The full statement in Section 315(a) reads as follows: "Nothing in the foregoing sentence [i.e., exemption from equal time requirements for news-type programs] shall be construed as relieving broadcasters, in connection with the presentation of news-casts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

⁴See Appendix B.

4 Add.

to different situations and in different ways. The "equal opportunities" requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions involving specified news-type programs, the law provides that if a licensee permits a person who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station. The Commission's Public Notice on Use of Broadcast Facilities by Candidates for Public Office, 27 Fed. Reg. 10063 (October 12, 1962), should be consulted with respect to "equal opportunities" questions involving political candidates.

The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. See par. 9, Editorializing Report. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.

Interpretative Rulings—Commission Procedure

We set forth below a digest of the Commission's rulings on the fairness doctrine. References, with citations, to the Commission's decisions or rulings are made so that the researcher may, if he desires, review the complete text of the Commission's ruling. Copies of rulings may be found in a "Fairness Doctrine" folder kept in the Commission's Reference Room.

In an area such as the fairness doctrine, the Commission's rulings are necessarily based upon the facts of the particular case presented, and thus a variation in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rulings for guidance, look not only to the language of the ruling but the specific factual context in which it was made.

It is our hope, as stated, that this Notice will reduce significantly the number of fairness complaints made to the Commission. Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.⁵ (Lar Daly, 19 R.R. 1104, March 24, 1960; cf. Cullman Bctg. Co., FCC 63-849, Sept. 18, 1963.)

If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter. Full opportunity is given to the licensee to set out all programs which

⁵The complainant can usually obtain this information by communicating with the station.

he has presented, or plans to present, with respect to the issue in question during an appropriate time period. Unless additional information is sought from either the complainant or the licensee, the matter is then usually disposed of by Commission action. (Letter of September 18, 1963 to Honorable Oren Harris, FCC 63-851.)

Finally, we repeat what we stated in our 1949 Report:

* * * It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

TITLE I OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF

1969, 42 U.S.C. §§ 4331-35,
1969, 83 STAT. 852

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101(a). The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the national environment, particularly the profound influence of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create

7 Add.

and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations,

and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appro-

9 Add.

priate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

10 Add.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.



BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,556

FRIENDS OF THE EARTH and
GARY A. SOUCIE,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

United States Court of Appeals
for the District of Columbia Circuit

CITIZENS FOR CLEAN AIR, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenors.

FILED JAN 25 1971

Nathan J. Paulson
CLERK

ON PETITION FOR REVIEW OF A RULING OF THE
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TABLE OF CONTENTS

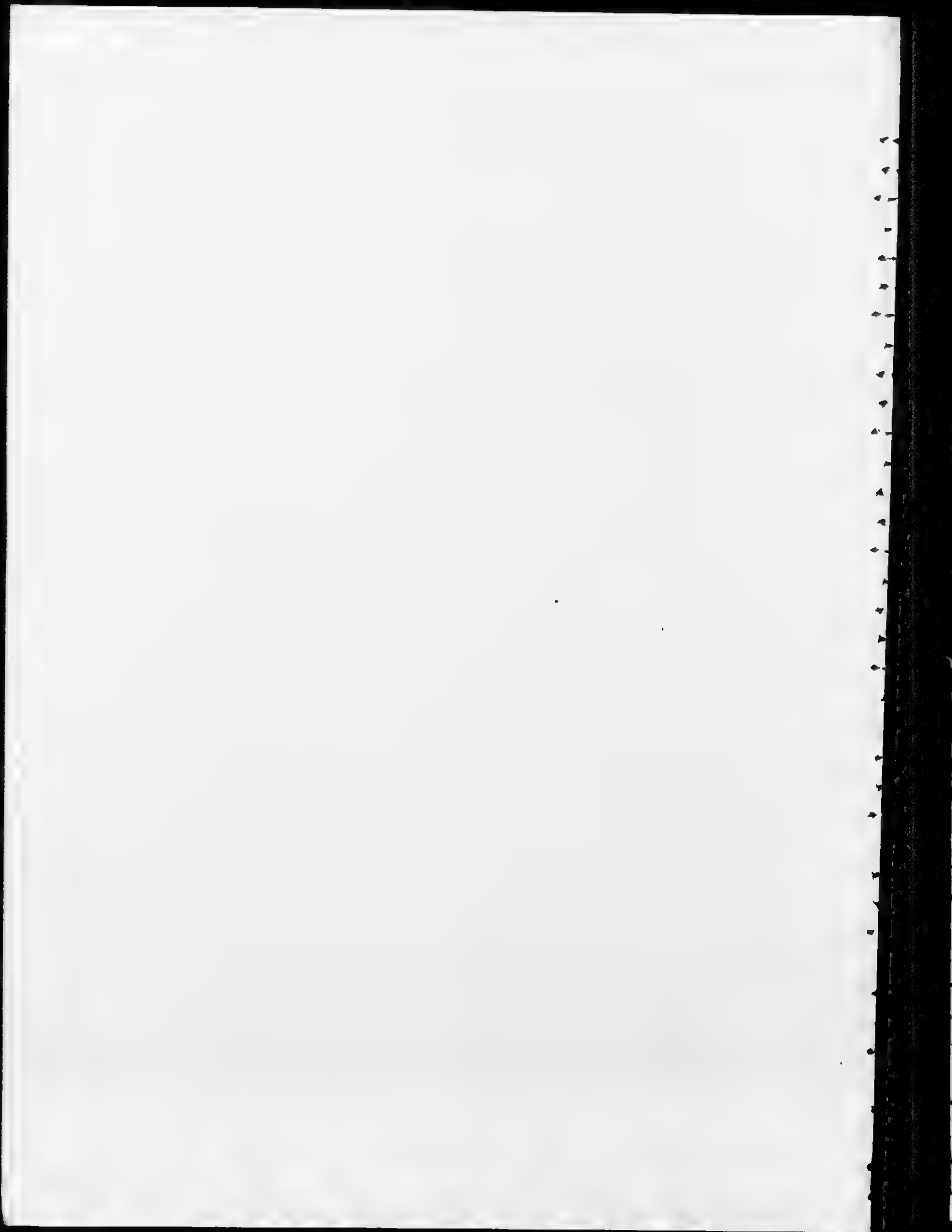
	<u>Page</u>
STATEMENT OF ISSUE PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
A. Petitioners' Letter To WNBC-TV.	2
B. The Commission's Ruling.	6
ARGUMENT	11
I. THE COMMISSION PROPERLY DETERMINED THAT THE CARRIAGE OF AUTOMOBILE AND GASOLINE COMMERCIALS BY WNBC-TV DID NOT IMPOSE UPON IT A DUTY, BEYOND NORMAL ATTENTION TO POLLUTION PROBLEMS, TO CARRY ANTI-AUTOMOBILE AND ANTI-GASOLINE ANNOUNCEMENTS IN A SIGNIFICANT RATIO TO THE PRODUCT COMMERCIALS.	11
II. THE COMMISSION ADEQUATELY DEALT WITH THE ALLEGATIONS OF THE COMPLAINT.	21
III. THE ARGUMENT OF INTERVENOR CITIZENS FOR CLEAN AIR, INC. THAT THE COMMISSION HAS VIOLATED THE FIRST AMENDMENT IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, LACKS MERIT.	26
CONCLUSION	28

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases:</u>	
<u>Banzhaf v. F.C.C.</u> , 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), <u>cert. denied sub nom.</u> <u>Tobacco Institute v. F.C.C.</u> , 396 U.S. 842 (1969).	3, 12, 16
<u>Moog Industries, Inc. v. Federal Trade Commission</u> , 355 U.S. 411 (1958).	23, 27
* <u>Red Lion Broadcasting Co., Inc. v. F.C.C.</u> , 395 U.S. 367 (1969).	13
<u>Retail Store Employees Union v. F.C.C.</u> , ____ U.S. App. D.C. ____, ____ F.2d ____ Case No. 22,605, decided October 27, 1970.	13, 17, 21
<u>Unemployment Compensation Commission v. Aragon</u> , 329 U.S. 143 (1946).	23, 27
<u>United States v. L. A. Tucker Truck Lines, Inc.</u> , 344 U.S. 33 (1952).	22-23, 26
 <u>Administrative Cases:</u>	
* <u>Applicability of Fairness Doctrine to Cigarette Commercials</u> , 9 FCC 2d 921 (1967), affirmed <u>sub nom. Banzhaf v. F.C.C.</u> , 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), <u>cert. denied sub nom.</u> <u>Tobacco Institute v. F.C.C.</u> , 396 U.S. 842 (1969).	4, 7, 11, 12, 15
<u>NBC, Inc.</u> , 16 FCC 2d 956 (1969).	7
<u>National Broadcasting Co.</u> , 25 FCC 2d 935 (1970).	15
 <u>Statutes:</u>	
Cigarette Labelling Act of 1965, 79 Stat. 282	8, 15
Clean Air Act of 1965, 42 U.S.C. § 4331, 81 Stat. 485 (as amended, 1967)	18

	<u>Page</u>
 <u>Statutes:</u>	
Clean Air Act of 1970, Public Law 91-604	15
Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151 through 609	
Section 405	22, 26
National Environmental Policy Act of 1969, 83 Stat. 852	18, 19
Public Health Cigarette Smoking Act of 1969, Public Law 91-222	15
 <u>Other Authority:</u>	
<u>Notice of Proposed Rule Making to Ban Cigarette Advertising, 32 F. R. 13162.</u>	8

*Cases and other authorities chiefly relied upon are
marked with an asterisk.



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and UNITED STATES OF AMERICA,
Respondents,

CITIZENS FOR CLEAN AIR, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenors.

ON PETITION FOR REVIEW OF A RULING OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED *

Whether the Commission reasonably determined that it should not extend to automobile and gasoline advertising its ruling that the carriage of cigarette advertising by broadcast stations imposed a duty upon the licensees to devote a significant amount of broadcast time each week to presenting the case against cigarette smoking.

*/ This case has not previously been before this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners, Mr. Gary A. Soucie and Friends of the Earth, seek review of a ruling of August 5, 1970 by the Federal Communications Commission (A. 73, 24 FCC 2d 743)^{1/}. The Commission ruled that television station WNBC-TV, New York City, had not acted unreasonably pursuant to the fairness doctrine or the general public interest standard of the Communications Act of 1934 in rejecting petitioners' request that the station present free of charge material in opposition to advertisements carried by the station for automobiles and leaded gasoline.

A. Petitioners' Letter To WNBC-TV.

Mr. Soucie wrote to WNBC-TV on February 6, 1970 on his own behalf and that of Friends of the Earth. He asserted that "the bulk of WNBC-TV automobile and gasoline advertising is devoted to the biggest polluters of all-leaded high-test gasolines and automobiles with large-displacement engines." (A. 11.) With particular reference to four advertisements for automobiles and one for gasoline (A. 15)^{2/} the Soucie letter urged generally that automobile and gasoline advertisements

^{1/} Citizens For Clean Air, Inc., has intervened and filed a brief. The New York City Environmental Protection Administration appears as amicus curiae.

^{2/} The letter quoted phrases from three of the advertisements.

bombarded the public with "pitches" for large-engined cars and high-test gasolines which were substantial contributors to air pollution. It was urged that the station was "obliged to present the other (non-auto, non-gasoline) side of this issue" under this Court's ruling in Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969), dealing with cigarette advertising. The letter requested "that WNBC-TV promptly make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy." (A. 14.) It offered "to produce spot advertisements presenting the anti-auto-pollution case." (A. 14.)

The station manager of WNBC-TV wrote to Mr. Soucie on February 18, 1970 (A. 17). He stated first that the Commission had limited its ruling on cigarettes to that specific product and that, unlike cigarettes, "there is little, if any, controversy that transportation by automobile should continue;" therefore, he stated, advertising of automobiles could not be a discussion of one side of the anti-pollution issue. (A. 19.) The station stated its judgment that "references in advertisements to 'performance' or 'size' of automobiles or to gasolines being good for 'cold weather' are not . . . a discussion of a

pollution problem." (A. 19.) "The issue of air pollution," WNBC-TV's letter explained, "including the causes and effects of automobile emissions, has been extensively covered by WNBC-TV." The station included examples of its most recent programming on air pollution. (A. 19.)

On March 14, 1970, petitioners filed a complaint with the Commission (A. 1-10), asserting that the licensee's "arguments are wide of the mark" (A. 2). Petitioners argued that under the Commission's ruling requiring broadcasters who carried cigarette commercials to devote a significant amount of broadcast time to presenting the case against cigarette smoking,^{3/} commercials for automobiles and gasoline also were required to be accompanied by substantial amounts of anti-automobile and anti-gasoline material put on free of charge (A. 2). They asserted that advertisements for large displacement engines and gasolines with a lead additive "generally convey a message which supports one side of the controversial automobile and pollution issue" (A. 6). Mr. Soucie and Friends of the Earth

^{3/} See Applicability of Fairness Doctrine to Cigarette Commercials, 9 FCC 2d 921 (1967), affirmed sub nom. Banzhaf v. F.C.C., 132 U.S. App. D. C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969).

also argued that the programs presented by the station were an inadequate response to advertisements which they claimed were of greater frequency and more effective (A. 8-9).

The intervenor Environmental Protection Administration supported petitioners' complaint and set forth the pollution problem in New York City. (A. 27.) Intervenor Citizens for Clean Air, Inc. submitted a telegram expressing its support and expressed a willingness to provide stations with anti-pollution messages. (A. 40.)

NBC responded to the Environmental Protection Administration's letter, stating that "WNBC-TV has presented many programs and announcements which do express the anti-pollution point of view." It enclosed a partial list of programs for the first five months of 1970 and explained that "news reports in which an anti-pollution viewpoint was expressed were carried on a number of occasions, and over 200 public service announcements for anti-pollution, conservation, and other related organizations in the field of ecology or environment were carried by WNBC-TV during the first 6 months of 1970" (A. 44).

On July 30, 1970, Mr. Geoffrey Cowan on behalf of Friends of the Earth submitted a letter setting forth recent

developments on pollution hazards in New York and the eastern seaboard. (A. 56.) Mr. Cowan also explained that they did not contend that WNBC-TV "has totally failed to discuss ecology," noting that it made "a particular effort to discuss the environment this spring " (A. 56). However, he urged that the programming was inadequate. He then stated his belief that the inadequacy might be the result of WNBC-TV's reluctance to criticize the products it advertises. (A. 56.) He urged the Commission to enunciate a clear policy position.

B. The Commission's Ruling.

The Commission's ruling of August 5, 1970 (A. 73) noted first that the petitioners' argument rested upon two main contentions: first, that gasoline and automobile commercials come within the cigarette commercial standard of a product found to be harmful in normal use, and, second, that the advertisements (especially those for large-displacement engines and lead additive gasolines) convey a message that they are necessary for a full, rich life consonant with an unpolluted environment, thus presenting one side of a controversial issue of public importance. It also noted petitioners' view that WNBC-TV's programming on pollution did not satisfy the special obligation raised by the

presentation of numerous commercials.

The Commission preceded its consideration of petitioners' specific complaint with a discussion of pertinent background factors, in view of petitioners' large reliance upon what they contended was the fully analogous previous ruling with regard to cigarette advertising. The Commission stated that it had "applied the fairness doctrine--really the public interest standard" to the broadcast of cigarette commercials because they had been found by the Government to be a hazard to health in normal use, broadcasters were presenting commercials urging people to smoke, and the public interest required that the public be informed "to a significant extent" of the dangers from cigarette smoking (A. 78). This ruling, it noted, had resulted in the carriage of anti-smoking messages in a reasonable ratio to cigarette commercials, including periods of maximum audience listening. See Cigarette Advertising, 9 FCC 2d 921, 927, and NBC, Inc., 16 FCC 2d 956. The Commission also pointed out that it had stated at the time that it believed cigarettes to present a unique problem. 9 FCC 2d 921, 943-945. This was because (1) Cigarette smoking does not involve a balancing of competing interests. The Government for health reasons is urging people either not to begin

or to stop at once. (A. 79.) The Government is not, however, "urging people to stop now--without any delay--buying or using gasoline-engine automobiles. . . . The benefits and detriments here are of a more complex nature, and do not permit the simplistic approach taken as to cigarettes" (A. 79).

(2) There was a serious question whether cigarettes could be promoted at all on broadcast stations. An absolute prohibition was prevented at the time by the Cigarette Labelling Act of 1965, but at its expiration the Commission had proposed such a ban. See Notice of Proposed Rule Making, 32 F.R. 13162. That is not the case here. The Commission noted that no one proposes to stop promoting or using automobiles entirely; instead there is a recognition that "we must take prompt action to come to terms with the environmental effects of technology." (A. 79.) And, (3) the Commission observed that as was not the case with cigarettes, there existed action that could be taken directly with respect to the products. That is, other products could be barred or changed, whereas an attempted ban on cigarette use or production might well be poor public policy.

The Commission agreed that environmental issues were of great public importance, but stated that the "issues presented

complex questions of appropriate action on which licensee judgment as to the best method of coverage should not be foreclosed. The Commission stated (A. 81-82):

In this connection, the matter again differs from the cigarette area, where it was appropriate, and indeed fair, simply to track the cigarette advertisements with announcements calling attention to the fact that cigarettes are the main cause of such diseases as lung cancer, emphysema, and chronic bronchitis. See Federal Trade Commission Notice, 29 F.R. 8325.

It concluded that the cigarette ruling should not be extended to gasoline and automobile advertising, since these products were not susceptible to the simplistic approach taken with regard to cigarettes (A. 82-83). Product advertising generally, it noted, could not be "tracked" by a significant ratio of "anti" announcements without undermining the entire support for radio and television. The Commission fully recognized that the public interest standard must take into account public health, and specifically environmental pollution. It stated (A. 86-87) that the broadcaster has an obligation to inform the public on this issue, although the obligation is not rested upon the carriage of the product commercials.

Finally, the Commission noted that while petitioners challenged the adequacy of WNBC-TV's efforts in the area of air pollution, the station had submitted only a sample showing and that the showing indicated "significant coverage of the issue." (A. 88.) The Commission stated further that this was an area which was not appropriately before it at the time on the existing record, and was one which could be gone into at renewal time, upon an appropriate complaint and showing, when the licensee could demonstrate its overall record.^{4/}

^{4/} The Commission also found no indication to support the charge that WNBC-TV failed to cover pollution because it received support from automobile and gasoline advertisers.

ARGUMENT

- I. THE COMMISSION PROPERLY DETERMINED THAT THE CARRIAGE OF AUTOMOBILE AND GASOLINE COMMERCIALS BY WNBC-TV DID NOT IMPOSE UPON IT A DUTY, BEYOND NORMAL ATTENTION TO POLLUTION PROBLEMS, TO CARRY ANTI-AUTOMOBILE AND ANTI-GASOLINE ANNOUNCEMENTS IN A SIGNIFICANT RATIO TO THE PRODUCT COMMERCIALS.

The crucial issue in this case is whether the Commission reasonably refused to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials. In Cigarette Advertising, 9 FCC 2d 921 (1967), affirmed in Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969), the Commission held that because cigarettes constituted a significant health hazard to the American public, a radio or television broadcast station could not carry commercial announcements for cigarettes without also advising the public of the danger to its health through the allocation of a significant amount of time each week. While based in part upon the fairness doctrine, which requires that stations provide a reasonable opportunity for the presentation of conflicting views on controversial

issues of public importance, the cigarette ruling went beyond fairness, as this Court noted upon appeal (132 U.S. App. D.C. at 24, 405 F.2d at 1092) to hold that the public health aspect of the public interest required a special warning to the public which was "triggered" by presentation of commercials inducing people to smoke cigarettes. The simple issue was the desirability of smoking (see 9 FCC 2d at 927, 939), and the Commission found that advertising the product raised the issue even though no health argument was made in the cigarette commercials.^{5/}

Although the Commission stated its belief at the time (9 FCC 2d at 942-943) that the situation before it was unique, and that it did not foresee the extension of the ruling *to other products which its opponents* argued would have to be treated similarly, with resultant chaos, this case presents that issue directly for the first time. We believe that the Commission clearly acted within its allowable discretion in determining that the presentation of gasoline and automobile commercials did not warrant the special extension of normal fairness standards sought by petitioners.

^{5/} The Commission also noted (9 FCC 2d at 938) that cigarette commercials implicitly suggested that cigarette smoking was consistent with good health.

We should make clear at the outset that the Commission left no doubt that ordinary fairness requirements would apply to discussions of the controversial issue of pollution, its causes and cures, and that stations have a responsibility to cover this issue (A. 86-87). This is the licensee's duty without regard to his presentation of automobile or gasoline commercials. See Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969). It is also clear that a gasoline or automobile commercial which contains a discussion, argument or claim concerning the product's relationship to pollution may raise a different question from that involved here, and may bring fairness requirements directly into play (A. 84). Finally, this decision may not be dispositive of every future situation relating to commercial announcements, although it involves general policy considerations of rather broad application. ^{6/}

^{6/} Thus, in Retail Store Employees Union v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, Case No. 22,605, decided October 27, 1970, where a union was seeking a boycott of a struck department store employer, this Court found that advertisements of the store were part of the labor dispute, an area where Congress through legislation has indicated concern with equalizing the power of the opposing sides. While that case involved opposing announcements which the Court thought might not well serve the traditional purposes of the fairness doctrine to give the public access to relevant information, public policy in the labor relations field required equalization of treatment between the union and the store in their dispute. We believe this decision left open the issue presented here of whether another product advertisement should be treated as were the cigarette commercials. Indeed, the Court left open for decision by the Commission the disposition of the problem Retail Store Employees presented.

The precise issue as we see it is whether the Commission was required to treat gasoline and automobile advertisements as it had treated cigarette advertisements. For the reasons it gave, we think it clear that the special remedy it devised to deal with the special problem of cigarettes was not required to be adopted in this different area.

In the cigarette ruling, the Commission fashioned a remedy which went beyond normal fairness principles to require repeated presentation of the opposing view on health even though the cigarette commercials carried at most an implicit message on this issue. Furthermore, the Commission emphasized repetition rather than content. This unique treatment was because the problem was found to be unique in several respects. First, the ultimate issue was a simple one--to smoke or not to smoke. As the Commission found here (A. 79, 81), pollution issues do not lend themselves to such simplistic treatment. The steps to be taken, with respect to automobiles and gasolines as well as other sources of pollution, are complex, involving such possibilities as different gasolines, engine modifications, new types of engines, tighter emission standards, and limitations on the use of automobiles. While petitioners focus upon leaded

gasolines and high powered cars, these are patently not the whole of the problem.^{7/} In apparent recognition of this difference, petitioners did not propose a ban on promotion of these products or that a health warning be contained in the advertisement. The first of these remedies has now been adopted with respect to cigarettes (Public Law 91-222), and the second would have been adopted but for the Cigarette Labelling Act of 1965, 79 Stat. 282.^{8/} Petitioners thus seek to atomize the problem in an unwarranted fashion. Under fairness, upon which they rely, the Commission has found that it is not practical to destroy the licensee's capacity to deal with sub issues and to treat each sub issue as a separate fairness issue.^{9/} National Broadcasting Co., 25 FCC 2d 735 (1970).

The opposing briefs in this case fail to come to grips with the Commission's crucial finding that the complexities of the pollution problem made inappropriate the simplistic approach taken with respect to cigarettes. Instead, they read into the Commission's cigarette ruling

^{7/} For example, Congress in the Clean Air Act of 1970 (Public Law 91-604) recognized the complex nature of automobile pollution when it directed the Secretary of Health, Education and Welfare to take into account in setting standards for automobile emissions both technological and economic feasibility.

^{8/} See Cigarette Advertising, 9 FCC 2d at 935.

^{9/} Thus the Commission pointed out that "complainant in effect calls for ascertainment of the number of commercials promoting high-powered cars, the number promoting the smaller cars, the number and nature of the programs dealing with the issue of air pollution stemming from the gasoline engine automobile, and then a judgment whether the difference in time, as between the large and small cars, is sufficiently great to call for the presentation of further time to the side which the complainant espouses. We have no such information before us." (Footnote omitted.) (A. 83.)

and this Court's affirmance of that ruling in the Banzhaf case narrower definitive standards which they claim must govern every kind of product advertising and which they claim the Commission erroneously failed to apply here. They urge that the Commission must direct the tracking of product advertisements whenever the product presents a substantial danger to public health in normal use and is found to constitute such a danger by public health authorities. However, while it is true that the Commission based its public interest finding on these elements in the cigarette case, and this Court recognized their validity as bases for Commission action under the Communications Act, neither the Commission nor the Court indicated that these factors alone would always require the simplistic treatment found appropriate with respect to cigarettes.^{10/}

The only standards set forth by this Court in Banzhaf were the five considerations which it found prevented

^{10/} Indeed, the Court stated its agreement with the Commission that cigarette advertising presents a unique situation. See Footnote 63, Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute v. F.C.C., 396 U.S. 842 (1969).

conflict with the First Amendment once the Communications Act had been construed as permitting the Commission's public health ruling. At the time of its cigarette ruling the Commission made clear that the particular remedy it was there invoking would very likely not be extended to other products, and while it could not foresee all of the considerations which might be involved in a future decision as to whether to apply the cigarette ruling to other products, it has now decided that the ruling should not be applied to gasoline and automobiles. Its reasons for this decision cannot be dismissed on the theory that the definitive test for all products, whatever new issues they might raise, was laid down in the cigarette case.^{11/}

In addition, effective action can be taken with respect to automobiles and gasolines that was not available with respect to cigarettes, thus reducing the necessity for fashioning a special remedy related to advertising. As the Commission stated (A. 80):

^{11/} It should be noted that Retail Store Employees Union v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, Case No. 22,605, decided October 27, 1970, upon which opponents rely, also sets forth no conclusive standards in this area but rather admonishes the Commission to consider all aspects of each fairness problem.

It was urged that cigarettes are a legal product, and thus there can be no question of promoting their use. To this we answered that in light of the national experience with liquor, prohibition of use of cigarettes might be adjudged poor policy by the Congress, but that would be all the more reason to act effectively in the areas that remained open--namely, educational campaigns and forbidding promotion (which would undercut such campaigns). See Letter to Senator Moss, September 17, 1969, 24 FCC 2d 144. This consideration is not applicable to these other products or services. There could be no thriving bootlegging industry of airplanes, electric power plants, autos, detergents, etc. This means that more direct and effective Governmental action, if appropriate, is perfectly feasible.

This is not a failure to recognize that automobiles contribute to pollution, or that some automobiles and some gasolines contribute more than others. Nor is it a failure to abide by the command of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. §4331 (Pet. Br. 39-46). As petitioners concede (Br. 39), the Commission was fully cognizant of this statute. Petitioners' argument on this score simply turns back to their primary contention that the Commission could not reasonably handle the problem the way it did. Petitioners admit (Br. 41) that the Commission decided that a general fairness approach would best serve the public interest, but insist that this was on the erroneous premise

that the policy of the Act "is solely concerned with governmental action," whereas the Act provides that every person has a responsibility to contribute to the preservation and enhancement of the environment. (Pet. Br. 41-42.) We do not think the Commission's opinion, read as a whole,^{12/} will bear that construction. The crux of the Commission's holding was not that government action was involved (with respect to which broadcast announcements might be only indirectly related), but rather that automobiles and gasolines did not raise the same simple issues as cigarettes. Otherwise its insistence (A. 87) that broadcasters have an obligation to inform the public in this area, including prime time periods, would have been omitted from its decision. Petitioners claim (Br. 43) that the National Environmental Policy Act requires the Commission to help insure that the public effectively be informed of the other side of this issue, but fail to demonstrate that the Commission's approach is not reasonably related to that goal.

^{12/} The Commission's reference to informing the public "as a predicate for action by elected officials," upon which petitioners rely (Br. 40), obviously did not govern its ruling. It was fully aware that individual action was also part of the picture.

Finally, the Commission noted the grave problems attendant upon a far reaching ruling that the controversial nature of a product requires a tracking of all commercials with anti-product announcements (A. 83, 85). Since the commercial broadcasting system does focus upon public issues, it would hardly serve the public interest to undercut its ability to do so by requiring numerous announcements which could not be accommodated without destroying the industry's economic base.

In sum, the Commission reasonably determined that the per se procedure devised for cigarette advertising was not appropriate here. It sustained the view largely urged in petitioners' brief that the broadcaster must present programming designed to reach the relevant audience, and found that there had been no indication on this record of a failure in that respect, since WNBC-TV had been covering the issue. Permitting the issue to be governed by normal fairness and public interest consideration has not been shown to be ^{13/}unreasonable.

^{13/} While we note the claim that the Commission failed to define the standards which determined its ruling (Pet. Br. 37-38), the Commission's opinion was amply clear in explaining why it rejected petitioners' approach. Its opinion went as far in terms of setting general policy as could reasonably be expected in an area where unforeseen issues constantly arise, and even those more readily foreseen can best be decided in the concrete setting of specific facts.

II. THE COMMISSION ADEQUATELY DEALT WITH
THE ALLEGATIONS OF THE COMPLAINT.

Petitioners' first argument, starting at page 14 of their brief, appears to be that the Commission departed from its normal procedure in fairness cases by failing to focus upon the particular allegations in the complaint and the particular situation in New York City, WNBC-TV's community of license. It is urged that this failure led the Commission into misinterpretations of the complaint.^{14/}

Petitioners thus urge that the Commission made "national" findings, not local ones relevant to the situation in New York City where officials had urged drivers to stop using cars (Pet. Br. 25-26). But the Commission clearly treated the question before it as one affecting cities, like New York, where pollution caused by automobiles is a

^{14/} It is urged in footnote 27, p. 23, that the Commission gave inadequate treatment to the allegation that WNBC-TV might be inhibited in its coverage of the pollution issue by its dependence upon automobile and gasoline advertisers. Petitioners rely upon the remand in Retail Store Employees Union, supra. But the Commission properly found here (A. 87) that there was no indication of any such problem. In the cited case this Court found indications of pressure requiring further investigation, i.e., the union claimed without being disputed that no radio station in Ashtabula would carry its paid advertisements, the advertisements were not objectionable on their face, and WREO had carried them but dropped them for a reason which was inadequate on its face.

serious problem. It would not have affected the decision for the Commission to have restricted its ruling to one city. Moreover, it is not possible to read the complaint filed with the Commission (A. 1-10) as relating only, or even primarily, to New York City as distinguished from other cities. The problem is addressed by petitioners themselves as a national problem, with only intermittent references to New York. Finally, if the Commission misunderstood the focus of the complaint, and this was clear to petitioners, it was their duty to point this out first to the Commission. Having failed to do so, they may not raise the argument for the first time upon appeal. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405.^{15/} As the Supreme Court has held, "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."

^{15/} Section 405 of the Act states that a petition for rehearing shall not be a condition precedent to judicial review except where the party seeking such review "relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 413-414 (1958); Unemployment Compensation Commission v. Aragon, 329 U.S. 143 (1946).

Petitioners also assert (Br. 26-29) that although "the complaint was clearly limited to one form of programming-- i.e., automobile and gasoline commercials," the Commission's opinion "meshed those commercials with advertisements for other products which can damage the environment," and failed to discuss the advertisements cited in the complaint. It is difficult to understand what is claimed as error here. The Commission's opinion clearly stated petitioners' argument with respect to automobile and gasoline advertisements (A. 74-76), it discussed its general view set forth in the cigarette ruling that cigarettes were in a unique status (A. 78-80), and it set forth its reasons why it was adhering to that view so far as automobile and gasoline advertisements were concerned (A. 81-83).

It is quite true that the Commission indicated its further view that other products should probably be treated like gasoline and automobiles rather than like cigarettes, and that extending the cigarette ruling to all

product advertising would raise serious problems of a practical nature. But this surely was not error so long as the ruling on automobile and gasoline advertising was adequately explicated so as to permit review. On the contrary, an agency would be remiss if it failed to take due account of the effect of its ruling in similar situations involving similar problems.

Nor do petitioners raise a substantial question by their allegation (Br. 27-29) that the Commission ignored the specific commercials they cited in their complaint. The complaint described generally or quoted brief portions of five commercials (A. 15), which were alleged to imply that the good life is connected with large engines and high-test leaded gasoline. These commercials contained no explicit discussion of the pollution issue, something the Commission obviously had reference to when it emphasized (A. 84) that its ruling was restricted to general product advertising and that, "a commercial could deal directly with an issue of public importance; if so, the fairness doctrine is fully applicable."^{16/}

^{16/} The examples given by the Commission, while not the same ones quoted by petitioners, did not differ from them in regard to the relevant issue of whether the advertisements argued one side of the pollution issue.

Therefore, their significance as examples was to raise the issue of whether advertising for high powered cars and leaded gasolines required the same treatment given the advertising of cigarettes. This issue, of course, was the focus of the Commission's entire opinion. No further discussion of the particular advertisements cited by petitioners was a predicate to a valid opinion.

III. THE ARGUMENT OF INTERVENOR CITIZENS FOR CLEAN AIR, INC. THAT THE COMMISSION HAS VIOLATED THE FIRST AMENDMENT IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, LACKS MERIT.

Intervenor Citizens for Clean Air, Inc. urges (Br. 24-31) that the Commission's decision violates the First Amendment because it excludes automotive advertising from the fairness doctrine, arbitrarily distinguishing automotive advertising from cigarette advertising, and because the Commission has delegated to licensees the initial determination of whether there is a controversial issue of public importance. These contentions were not presented to the Commission, and are therefore improperly sought to be raised for the first time on this appeal. Section 405 of the Communications Act, 47 U.S.C. § 405, provides that the filing of a petition for rehearing (which was not done here) is not a condition precedent to judicial review except where a party "relies on questions of fact or law upon which the Commission, or delegated authority within the Commission, has been afforded no opportunity to pass." Even absent this specific statutory requirement it is well established that error cannot be claimed upon a ground the agency was not first given an opportunity to rule upon. United States v. L. A.

Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 413-414 (1958); Unemployment Compensation Commission v. Aragon, 329 U.S. 143 (1946).

The specific contention that the Commission erroneously permits licensees to make an initial determination, reviewable by the Commission for reasonableness, as to whether there is a controversial issue of public importance, has no factual predicate in this case. While it is the Commission's policy under the fairness doctrine to review this aspect of licensee conduct for reasonableness, it seems amply clear that in this particular case the Commission itself made a comprehensive ruling because of the importance of the problem presented, and did not base its decision in any sense on the proposition that there was before it a reasonable determination by the licensee which it would not disturb. All of the briefs before the Court correctly argue this appeal as involving a policy decision directly made by the Commission itself.

The additional generalized arguments based upon the First Amendment amount to no more than the derivative contention that since this is an area with First Amendment ramifications,

an arbitrary and incorrect Commission decision departing from the governing precedent of cigarette ruling must also necessarily violate the First Amendment. There is, of course, no need to reach this argument. If the Commission's decision should be found to be an arbitrary departure from past policy without rational explanation a remand would be required on that ground. Whether the First Amendment might also require a reversal would not require exploration. Since the intervenor makes no argument that the Commission's decision violates the Constitution even if otherwise sound policy under the Communications Act, there does not appear to be any need for further discussion of the First Amendment question.

CONCLUSION

For the foregoing reasons the petition for review should be denied and the Commission's ruling should be affirmed.

Respectfully submitted,

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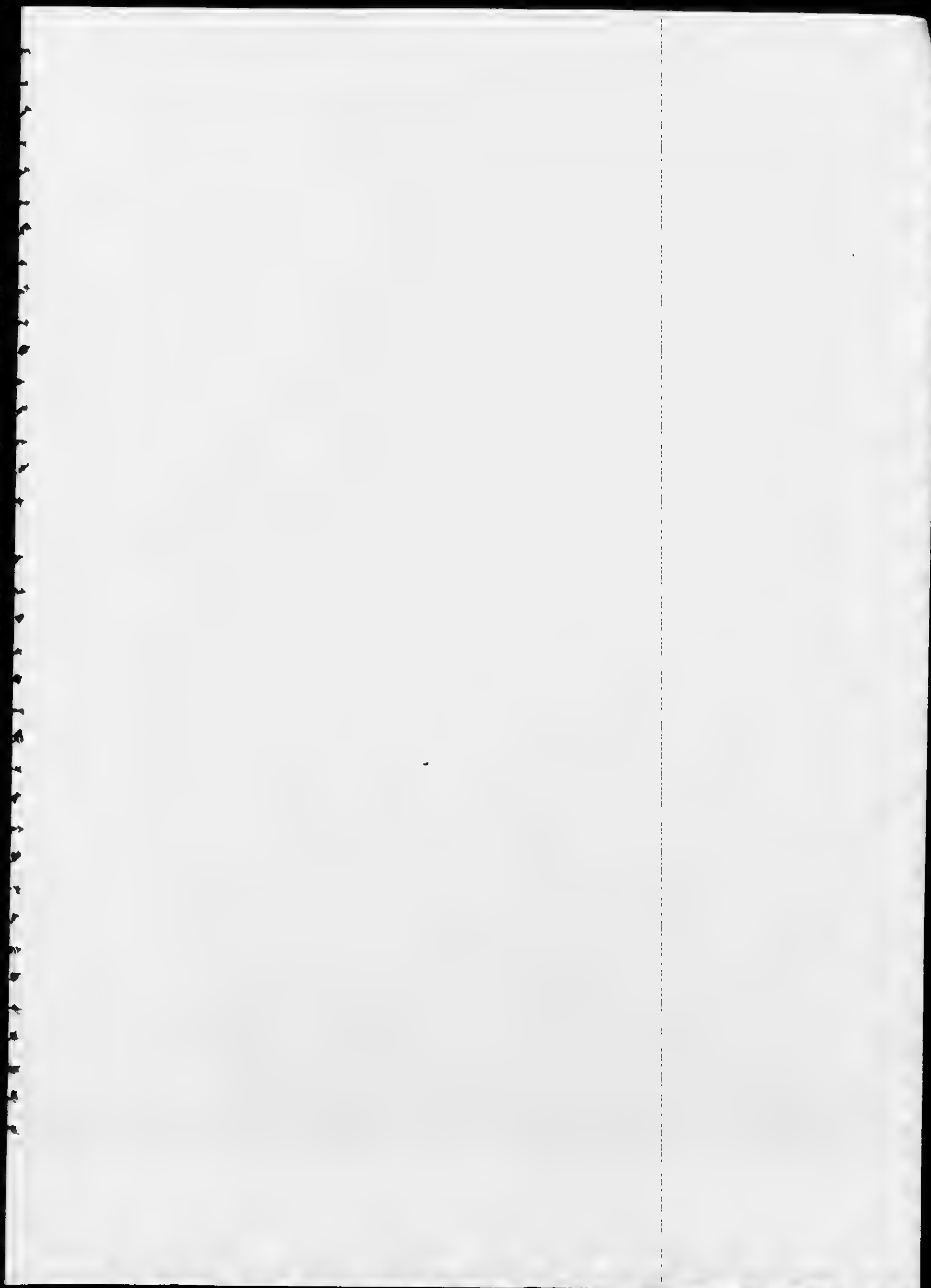
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January 25, 1971



No. 24,556

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, and
GARY A. SOUCIE,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

On Petition to Review
an Order of the
Federal Communications Commission

BRIEF FOR INTERVENOR
NATIONAL BROADCASTING COMPANY, INC.

United States Court of Appeals
for the District of Columbia Circuit

JAN 20 1971

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Was the Federal Communications Commission unreasonable in concluding that Station WNBC-TV did not act unreasonably or in bad faith in refusing to grant the free use of its facilities for the broadcast of "anti-auto-pollution" or "non-auto, non-gasoline" spot announcements in opposition to automobile or gasoline advertisements which had been broadcast by the station?

2. Does the National Environmental Policy Act require the Federal Communications Commission to administer the fairness doctrine so as to require Station WNBC-TV to afford the right to petitioners to broadcast free spot announcements in response to automobile and gasoline commercial advertisements?

3. Does the First Amendment to the Constitution require that the Federal Communications Commission and not the broadcaster determine whether an issue is a controversial one of public importance within the meaning of the fairness doctrine?

INDEX

	Page
Counter Statement of Issues Presented	i
Statement of the Case	2
Summary of Argument	6
Argument	8
I. The Federal Communications Commission Was Not Unreasonable in Concluding that Station WNBC-TV Did Not Act Unreason- ably in Refusing to Provide Free Time for Announcements to Petitioners	8
A. The Regulatory Scheme of the Fairness Doctrine Directs the Licensee to Make Reasonable Judgments in Good Faith and the Commission's Role Is to Determine Whether the Licensee Acted in Good Faith	8
B. Station WNBC-TV and the Commission Properly Refused to Extend the Cigarette Ruling to Automobile and Gasoline Ad- vertising	10
(i) Uniqueness	11
(ii) Fortuitous Events	12
(iii) Competing Interests	14
C. The Commission's Ruling Is Not Vulner- able to the Technical Objections Raised by Petitioners	15
(i) The Commission's Consideration of Local Conditions	16
(ii) The Specific Advertisements Con- sidered	17
(iii) The Commission's Consideration of the Alleged Economic Pressures on WNBC-TV	18

	Page
D. The Commission's Decision Has Not Produced an Arbitrary or Unreasonable Result	21
II. The Commission Properly Fulfilled Its Responsibility Under the National Environmental Policy Act	22
III. The First Amendment Requires that the Licensee, Not the Commission, Determine Whether a Controversial Issue of Public Importance Has Been Raised	29
Conclusion	34

TABLE OF CITATIONS

CASES:

* <i>Banzhaf v. FCC</i> , 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), <i>cert. denied</i> , 396 U.S. 842 (1969)	10, 11, 12, 13, 14, 17, 25, 26, 32, 33
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960) ..	29
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962)	21
<i>Clarksburg Publishing Co. v. FCC</i> , 96 U.S. App. D.C. 211, 225 F.2d 511 (D.C. Cir. 1955)	20, 21
<i>Greater Boston Television Corp. v. FCC</i> , No. 17,785 (D.C. Cir., Nov. 13, 1970)	16, 21, 22
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233 (1936)	30
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952)	29
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	26
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1938)	29
<i>Mass. Universalist Convention v. Hildreth & Rogers Co.</i> , 183 F.2d 497 (1st Cir. 1950)	31

* Cases or authorities chiefly relied upon are marked by asterisks.

	Page
<i>McCarthy v. FCC</i> , 129 U.S. App. D.C. 56, 390 F.2d 471 (D.C. Cir. 1968)	16
<i>McIntire v. William Penn Broadcasting Co.</i> , 151 F.2d 597 (3rd Cir. 1945), <i>cert. denied</i> , 327 U.S. 779 (1946)	31
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943)	32
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	30
<i>Paducah Newspapers, Inc. v. FCC</i> , 134 U.S. App. D.C. 287, 414 F.2d 1183 (D.C. Cir. 1969)	21
<i>Philadelphia Television Broadcasting Co. v. FCC</i> , 123 U.S. App. D.C. 298, 359 F.2d 282 (D.C. Cir. 1966)	23
<i>Radio Corp. of America v. United States</i> , 341 U.S. 412 (1951)	22
<i>Radio Relay Corp. v. FCC</i> , 409 F.2d 322 (2d Cir. 1969)	21
* <i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969) 9, 25, 31, 32, 33, 34	
<i>Retail Store Employees Union, Local 880 v. FCC</i> , No. 22,605 (D.C. Cir., Oct. 27, 1970)	20
<i>United States v. Paramount Pictures</i> , 334 U.S. 131 (1948)	29
<i>West Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	32
CONSTITUTION AND STATUTES:	
*U.S. Constitution, First Amendment 7, 8, 25, 26, 29, 30, 32	
Administrative Procedure Act, 5 U.S.C. § 706	21
*Clean Air Act, as amended, 42 U.S.C. § 1857 <i>et seq.</i> ..	15
Clean Air Amendments of 1970, P.L. 91-604 (Dec. 31, 1970)	26

* Cases or authorities chiefly relied upon are marked by asterisks.

	Page
Communications Act of 1934, as amended,	
47 U.S.C. § 1 <i>et seq.</i>	8, 32
§ 153(h)	31
§ 309	20
*§ 315	9
§ 315(a)	8
*§ 326	25, 31
§ 405	29
Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-39	5
*National Emission Standards Act, as amended, 42 U.S.C. § 1857f-1 <i>et seq.</i>	26
National Environmental Policy Act of 1969, 42 U.S.C. § 4331 <i>et seq.</i>	7, 22, 23, 25, 26, 27, 28
§ 4331(a) [Sec. 101(a)]	27
§ 4332 [Sec. 102]	23
§ 4332(2) [Sec. 102(2)]	27
§ 4333 [Sec. 103]	23
New York Air Pollution Control Act, N.Y. Pub. Health Law § 1276(4) (McKinney Supp. 1970)	13

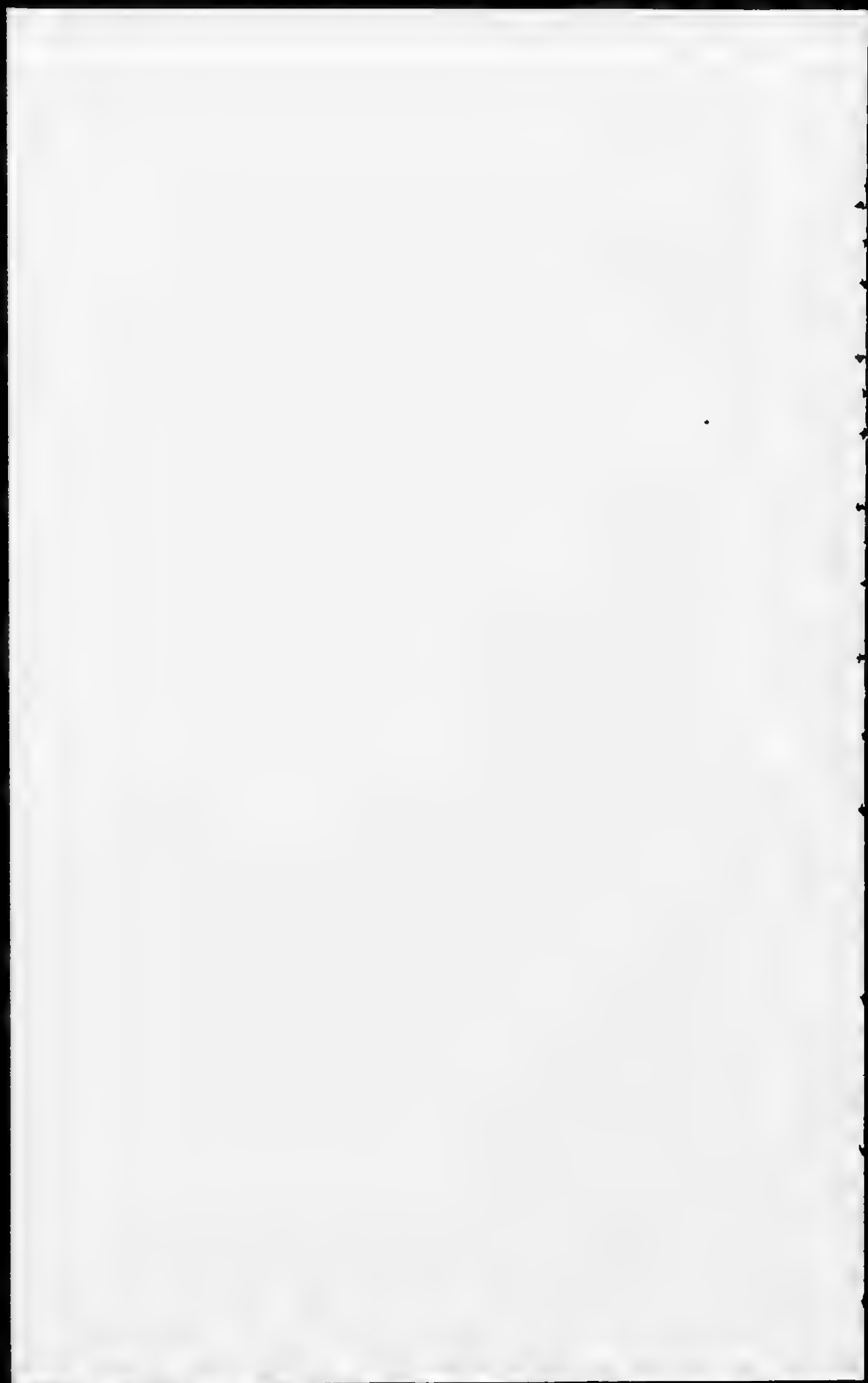
ADMINISTRATIVE MATERIAL:

- **Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 2 P & F Radio Reg. 2d 1901 (1964) 3, 9, 25
- **Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921, 11 P & F Radio Reg. 2d 1901 (1967), *aff'd sub nom. Banzhaf v. FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) 3, 11, 12, 18

* Cases or authorities chiefly relied upon are marked by asterisks.

	Page
<i>Citizens Against Proposition 15, 3 P & F Radio Reg. 2d 777 (FCC 1964)</i>	10
31 Fed. Reg. 5170 (1966)	26
33 Fed. Reg. 8304 (1968)	26
35 Fed. Reg. 17288 (1970)	26
<i>Hon. Oren Harris, 40 F.C.C. 582, 3 P & F Radio Reg. 2d 163 (1963)</i>	25
<i>Mid-Florida Television Corp., 40 F.C.C. 620, 4 P & F Radio Reg. 2d 192 (1964)</i>	9
* <i>Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 25 P & F Radio Reg. 1901 (1949)</i>	9, 25, 31
 LEGISLATIVE MATERIAL:	
<i>Conf. Rep. No. 91-765 to accompany S. 1075, 91st Cong., 1st Sess. (1969)</i>	23
<i>Conf. Rep. No. 91-1783 to accompany H.R. 17255, 91st Cong., 2d Sess. (1970)</i>	26
<i>Hearings on the Council on Environmental Quality Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 91st Cong., 2d Sess. (1970)</i>	24, 27
 MISCELLANEOUS:	
<i>Alfred I. duPont-Columbia University, Survey of Broadcast Journalism (1970)</i>	10, 20

* Cases or authorities chiefly relied upon are marked by asterisks.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,556

FRIENDS OF THE EARTH, and
GARY A. SOUCIE,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents

On Petition to Review
an Order of the
Federal Communications Commission

BRIEF FOR INTERVENOR
NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. (hereinafter "NBC") is the licensee of Station WNBC-TV (hereinafter "WNBC-TV"), a New York City television station which was the subject of the complaint in this case. NBC's petition for leave to intervene was granted by this Court on November 9, 1970.

STATEMENT OF THE CASE

The present proceeding was commenced on March 14, 1970 when Mr. Gary Soucie filed a letter complaint with the Federal Communications Commission (hereinafter the "Commission") against WNBC-TV, one of eight commercial television stations broadcasting in the New York City area. In essence, the complaint alleged that WNBC-TV had failed to fulfill certain (i) "fairness doctrine" obligations, and (ii) "public interest" obligations (App. 1, App. 15)* which Mr. Soucie alleged arose out of WNBC-TV's broadcast of automobile and gasoline commercials and its refusal to grant free broadcast time to respond thereto.

Prior to filing the complaint, Mr. Soucie had informed WNBC-TV, by letter dated February 6, 1970,¹ that he objected to commercial advertisements for automobile and gasoline companies and that it was his "understanding that under the Federal Communications Commission doctrine . . . and the cigarette ruling . . . WNBC-TV is obliged to present the other side (non-auto, non-gasoline) of this issue." (App. 12). Mr. Soucie mentioned as examples five advertisements² which, in his view, raised the pollution question. He stated that such advertisements "implied that

* References so designated are to pages in the Appendix; references to "Pet. Br." are to Petitioners' Brief; references to "C. Br." are to the Brief of Intervenor, Citizens for Clean Air, Inc.

¹ Mr. Soucie attached, as a "formal part" of his complaint, his February 6, 1970 letter to WNBC-TV and WNBC-TV's reply dated February 18, 1970 (App. 2).

² The advertisements were described by Mr. Soucie as follows:

- (1) "an advertisement for Ford Mustang, picturing the car on a lonely beach and stressing its 'performance' (large engine displacement)";
- (2) "an advertisement for Ford Torino stressing size";
- (3) "an advertisement for Chevrolet Impala stressing the great value of its size ('you don't have to be a big spender to be a big rider') including the standard 250-horsepower V-8 engine";
- (4) "an advertisement for Ford Mustang and Torino GT, again stressing size ('4-barrel, V-8' and 'up to 429

the good life is somehow inexorably connected with the use of powerful cars with large-displacement engines and high-test leaded gasoline." (App. 15). Mr. Soucie cited the cigarette ruling,³ asked WNBC-TV to make known the ways it intended to discharge what he claimed was its responsibility to inform the public about automobile pollution, and offered to produce spot announcements presenting the "anti-auto-pollution case." (App. 14).

On February 18, 1970, WNBC-TV responded to Mr. Soucie's February 6 letter stating that there was little, if any, controversy that transportation by automobile should continue and that "the advertising of automobiles cannot therefore be a discussion of the anti-pollution issue." (App. 19). WNBC-TV stated that "references in advertisements to 'performance' or 'size' of automobiles or to gasolines being good for cold weather" did not, in its opinion, constitute discussion of a pollution problem. (App. 19). WNBC-TV added that it had "extensively covered" the issue of auto emissions and informed Mr. Soucie that a sampling of its programming between November, 1969 and February, 1970 revealed it had covered this issue in at least one docu-

cubic inches') and advocating 'moving up to a larger car' "; and

- (5) "an advertisement encouraging the use of high-test leaded gasoline for cold-weather starting ('the cold-weather gasoline')". (App. 15).

It should be noted that the above-quoted references constitute petitioners' views as to what the subject advertisements stressed, advocated or encouraged. NBC submits that this description of the five advertisements is overly broad. Petitioners never submitted the actual advertisements, despite the requirement that they do so. (See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600, 2 P & F Radio Reg. 2d 1901, 1904 (1964)) [hereinafter cited as the "Fairness Primer"].

³ *Applicability of Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921, 11 P & F Radio Reg. 2d 1901 [hereinafter cited as the "Cigarette Ruling"] (1967), *aff'd sub nom.*, *Banzhaf v. FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

mentary, two panel discussions, and two news features dealing with air pollution, including the effects of automobile related pollution, thereby fulfilling its public interest obligation to discuss the issue of pollution. WNBC-TV also stated that it was its understanding that the cigarette ruling of the Commission had been intended to be limited only to cigarette advertising. (App. 17).

On the basis of these determinations, WNBC-TV informed Mr. Soucie that it did not believe the fairness doctrine required it to broadcast Mr. Soucie's proffered spot announcements.

Mr. Soucie thereafter filed his complaint with the Commission, which was followed in June of 1970, by letters to the Commission from the New York City Environmental Protection Administration and from Citizens for Clean Air, a New York City community group. The New York City Environmental Protection Administration's letter pointedly dealt *only* with the need for a general rule requiring the availability of free time to rebut automobile and gasoline advertisements. It specifically stated that it did not deal with the question of whether WNBC-TV "has allocated a sufficient amount of time to those who would highlight the dangers of automobile and gasoline pollution."⁴ (App. 28).

NBC responded with a letter setting forth a detailed list of some fifty of the programs⁵ carried in the first five months of 1970 which it felt demonstrated its awareness

⁴ Apparently the Administrator had not reviewed WNBC-TV's programming to see if it had in fact presented views on his side of the pollution issue. The Administrator stated that, if appropriate, the Environmental Protection Administration would present its views to the Commission on WNBC-TV's programming in this regard (App. 28). No such views were submitted.

⁵ The list did not purport to set forth all such programs but was rather a "partial list", to be considered in addition to news reports and over 200 public service announcements dealing with ecology and the environment. (App. 44).

of the problems of the environment and its efforts to fairly deal with and broadcast discussions of these problems. In addition to the programs listed, WNBC-TV stated that on a number of occasions it had carried news reports in which an anti-pollution viewpoint was expressed, and it had carried over 200 public service announcements for anti-pollution, conservation and other related organizations in the field of ecology or environment during the first six months of 1970 (App. 44).

On August 5, 1970, the Commission reached the decision now before the Court, finding that no action was warranted against WNBC-TV. Noting petitioners' position that WNBC-TV had failed to comply with the fairness doctrine and to meet its public interest obligations concerning the issue of automotive air pollution, the Commission in a very full and detailed decision held that (a) environmental pollution is an issue of public importance about which broadcasters should inform the public; (b) it is up to the broadcaster to determine, reasonably and in good faith, the nature of its coverage of the issue; (c) WNBC-TV's submission showed significant coverage of the issue, and (d) WNBC-TV could reasonably reject the announcement approach sought by petitioners.

The Commission declined to overrule the judgment of the licensee despite petitioners' claim that it should do so based on the cigarette ruling. The Commission stated that its decision in the cigarette case resulted from the overwhelming evidence of the hazards of smoking—hazards so great that the Commission would have banned cigarette advertising completely had such action not been proscribed by the Cigarette Labeling and Advertising Act of 1965 (App. 79). The Commission noted that it had questioned how a broadcaster could carry advertisements for cigarettes in view of such hazards (App. 79). Emphasizing that cigarettes permitted a simplistic approach—advertisements suggesting the desirability of smoking are countered with

announcements that smoking is hazardous to health—the Commission stated that the pollution question did not permit such an easy solution. Emphasizing the complexity of the pollution problem, the Commission cited possible alternative approaches (*e.g.*, the establishment of emission standards and the development of new propulsion systems) and stated that it did not possess the necessary expertise to opt for any one of such approaches (App. 81), but that it would carry out policy decisions made by more qualified agencies (App. 85).

SUMMARY OF ARGUMENT

The regulatory scheme envisioned by the fairness doctrine requires licensees, in their presentation of views on controversial issues of public importance, to make reasonable judgments in good faith as to whether a controversial issue of public importance is involved, what viewpoints should be presented, as well as the format for presentation of views. In reviewing complaints against licensees, the Commission's role is to determine whether the licensee acted reasonably and in good faith.

The record herein fully and completely demonstrates that WNBC-TV acted reasonably and in good faith when it determined that automobile and gasoline advertisements broadcast by it did not constitute a discussion of one side of a controversial issue of public importance so as to obligate it to grant free air time for the broadcast of "anti-auto-pollution" or "non-auto, non-gasoline" spot announcements. WNBC-TV fully recognizes the fact that pollution is a controversial issue of public importance. Consistent therewith, it has devoted broadcast time to the pollution question in a manner and format it deemed best suited to the question—indeed, the Commission found that WNBC-TV has shown "significant coverage" of the issue.

The Commission correctly refused to extend the cigarette ruling to automobile and gasoline advertising. The Com-

mission and this Court expressly found that cigarettes were a "unique" product which, independent of any intervening factors, presented documented hazards to the health of those who smoked. The solution to cigarette hazards, both found, was a very simple one in which the advertising of cigarettes could be balanced by a campaign of announcements urging people not to smoke. But in the instant case the Commission concluded that the problem and the resulting hazards were of a very different nature. Automobile air pollution is vastly different from cigarettes, not permitting of simplistic solutions. Further, determined the Commission, the hazards depended upon numerous intervening fortuitous events (including weather conditions, winds and population density). Moreover, unlike cigarettes, automobiles and gasoline have social utility, will continue to be used and are not habit forming, thereby negating any efficacy of anti-automobile announcements.

The Commission emphasized that the problem of air pollution lent itself to a variety of solutions, including development of new engines and product emission standards. The Commission concluded that "the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising aspects." Such a focus is amply demonstrated in the vast network of federal and state air pollution legislation regulating motor vehicle emissions and requiring the development of a virtually pollution-free automobile.

The National Environmental Policy Act does not require that the Commission direct the licensee to give free time to petitioners and the Commission properly fulfilled its responsibility under the Act.

Contrary to the argument made in support of petitioners, the First Amendment to the Constitution does not require that the licensee's judgment as to fairness questions be subject to *de novo* review by the Commission and the Court. The standard is properly the reasonable good faith

judgment of the licensee. To involve the Commission and the Court in *de novo* review would put the Commission in the position of dictating what programs and views would be broadcast, in clear violation of the licensee's First Amendment rights as well as the express language of the Communications Act.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION WAS NOT UNREASONABLE IN CONCLUDING THAT STATION WNBC-TV DID NOT ACT UNREASONABLY IN REFUSING TO PROVIDE FREE TIME FOR ANNOUNCEMENTS TO PETITIONERS

- A. The Regulatory Scheme of the Fairness Doctrine Directs the Licensee to Make Reasonable Judgments in Good Faith and the Commission's Role Is to Determine Whether the Licensee Acted in Good Faith.

The Commission's fairness doctrine provides that where a broadcaster's facilities are used for the discussion of a controversial issue of public importance, the broadcaster must afford reasonable opportunity for presentation of contrasting points of view. As stated in Section 315(a) of the Communications Act of 1934, the broadcaster's obligation is to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U.S.C. § 315(a)).

Throughout the Commission's history of interpreting the fairness doctrine, it has consistently held that the selection and presentation of program material lies within the responsibility of the licensee and not the Commission, and that the role of the Commission in reviewing fairness complaints is limited to a determination of the good faith and

reasonableness of the licensee's action. If it is found that the licensee acted in good faith, the Commission will not substitute its judgment for that of the licensee.⁶ In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) the Supreme Court noted that (i) Congress had, in 1959, expressly accepted and ratified the Commission's thirty years of consistent administrative construction of the fairness doctrine (395 U.S. at 382) and (ii) that the fairness doctrine was "a legitimate exercise of congressionally delegated authority" (395 U.S. at 385).

These Commission pronouncements make clear that broadcasters are to be afforded wide discretion in complying with the fairness doctrine. The Commission has consciously refrained from establishing a rigid formula for compliance, recognizing that the mechanics of achieving fairness necessarily vary with the circumstances. *Mid-Florida Television Corp.*, 40 F.C.C. 620, 4 P & F Radio Reg. 2d 192, 195 (1964). Unlike the "equal opportunities" provision of Section 315 of the Communications Act, which deals with legally qualified candidates for public office, the question under the fairness doctrine is one of the reasonableness of the station's action and not whether absolute equality in allocation of time has been achieved. What is required is that the broadcaster make a reasonable effort

⁶ The Commission has stated that:

"... the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming . . . In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." (*Fairness Primer*, 40 F.C.C. 598, 599, 2 P & F Radio Reg. 2d 1901, 1904 (1964)). See also *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 P & F Radio Reg. 1901 (1949) [hereinafter cited as the "Report on Editorializing"].

to present contrasting viewpoints on controversial issues of public importance on an overall basis. *Citizens Against Proposition 15*, 3 P & F Radio Reg. 2d 777, 778 (FCC 1964).

The record herein clearly establishes the reasonableness of the licensee's judgment as well as the reasonableness of the Commission's affirmance. Both the licensee and the Commission expressly recognized the fact that pollution is a controversial issue of public importance. Indeed, the Commission characterized pollution as one of the burning issues of the seventies. WNBC-TV demonstrated its coverage of the issue with a list of fifty programs presented on WNBC-TV during the first five months of 1970, exclusive of coverage on news programs and over 200 public service announcements dealing with ecology and the environment and the Commission found that WNBC-TV has shown it presented "significant coverage" of the issue. This conclusion is amply supported by the recent Alfred I. duPont-Columbia University, *Survey of Broadcast Journalism* 83 (1970) where it is stated: "Night after night substantial time was devoted by [NBC] network news to the subject." See generally *duPont* at 81-91.

B. Station WNBC-TV and the Commission Properly
Refused to Extend the Cigarette Ruling to Auto-
mobile and Gasoline Advertising.

Petitioners' contention (Pet. Br. pp. 29-38) that the Commission failed to apply its own procedures for reviewing a fairness complaint concerning advertisements is no more than a contention that the result of the Commission's ruling should have been favorable to the petitioners, as it was to the complainant in the cigarette ruling. The fact is that the Commission followed not only its own procedures but also the guidelines established by this Court in *Banzhaf v. FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

In support of their position, petitioners cite multitu-

dinous statistics concerning the contribution of automobiles to air pollution. WNBC-TV does not dispute the fact that air pollution, particularly that caused by automobiles in our urban centers, is one of the significant domestic problems facing the nation today. We fully accept the Commission's characterization of the issue as one of the significant issues of the seventies and consistent therewith the station has devoted substantial program time to coverage of the pollution question. However, although the dangers to the public health are indeed great in the case of both cigarettes and pollution from automobiles, the nature of the products and the available means to cure the evil each product presents are so vastly different as to preclude a ruling on automobile and gasoline advertising identical in result to that on cigarette advertising. In the light of this Court's decision in the *Banzhaf* case, the cigarette ruling result should not be applied to automobile pollution since: (a) the ruling was explicitly limited to cigarettes; (b) the dangers of automobile pollution depend upon intervening fortuitous events, and (c) the simple solution arrived at with respect to cigarettes will not apply to automobiles in light of the competing public interest considerations involved.

(i) *Uniqueness*

The "uniqueness" of cigarettes cannot be overemphasized. The Commission, in its *Cigarette Ruling*, stated that it knew of no other advertised product the normal use of which posed "such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine." (9 FCC 2d at 943, 11 P & F Radio Reg. 2d at 1930). This Court, in adopting this conclusion, stated:

"We agree with the Commission that 'cigarette advertising presents a unique situation' and we note that the Commission 'do[es] not now know' of any other advertised product which would warrant a comparable ruling.

. . .

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken." (*Banzhaf, supra* at 1097 n., 1099)

Although Commissioner Loevinger, in his concurring opinion in the *Cigarette Ruling* stated his view that automobile pollution posed a health hazard similar to cigarettes, and argued that cigarettes were not unique (9 FCC 2d at 954, 11 P & F Radio Reg. 2d at 1943), his view was rejected by both the remaining members of the Commission and by this Court. Both the Commission and the Court were not unaware of the pollution issue, but still found that cigarette advertising was unique.⁷ In fact, this Court, in affirming the Commission's cigarette ruling, emphasized that affirmation was no "open sesame." This Court stated:

"The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'" (*Banzhaf, supra* at 1099)

Thus, the Commission was complying, not only with its own earlier reasoning, but also with the guidelines set down by this Court, when it distinguished automobile and gasoline commercials from cigarette commercials.

(ii) *Fortuitous events*

Both the Commission and this Court in the *Banzhaf* case emphasized the fact that the danger to health posed by

⁷ The Commission's refusal in the instant case to extend the cigarette rule to automobiles was completely consistent with its earlier refusal to accept Commissioner Loevinger's views. Thus, petitioners' argument that the instant Commission decision amounts to a reversal or change in position (Pet. Br. pp. 15-16) is completely without merit.

cigarettes arose from normal use and did not depend on intervening fortuitous events. *Banzhaf, supra* at 1097. The Commission in the instant case emphasized this difference (App. 79).

It is not simply normal use of the automobile that presents the danger but rather additional factors such as population density and weather conditions which must always be taken into account. This fact is apparent from the materials submitted to the Commission in the instant case by or on behalf of petitioners which refer to, *inter alia*, congested municipalities (App. 28); urbanization (App. 34); presence of strong sunlight (App. 58) and temperature inversions (App. 66). The Commission took account of such factors, stating:

"We recognize that, because of the weather conditions or other factors, there may be Governmental strictures on the use of automobiles in major cities." (App. 79)

See also the New York Air Pollution Control Act which directs that in promulgating emission standards for motor vehicles, there shall be given:

"... due recognition to the fact that the quantity or characteristics of air contaminants or the duration of their presence in the atmosphere, which may cause air pollution in one area of the state, may cause less air pollution or not cause any air pollution in another area of the state, and it shall take into consideration in this connection such factors, among others found by it to be proper and just, as existing physical conditions, zoning classifications, topography and prevailing wind directions and velocities and also the fact that a code, rule or regulation and the degree of conformance therewith which may be proper as to an essentially residential area of the state may not be proper as to a highly developed industrial area of the State." N.Y. Pub. Health Law, § 1276(4) (McKinney Supp. 1970).

Thus, the cigarette rule, by its own terms, is inapplicable to automobile and gasoline advertisements since interven-

ing factors are necessary to create the dangers of automobile pollution.

(iii) *Competing Interests*

Furthermore, the Commission could reasonably refuse to extend the cigarette ruling to automobiles and gasoline on the ground that the issue of automobile pollution is much more complicated than the issue of smoking cigarettes. Such a distinction is likewise in accordance with the guidelines laid down by this Court in *Banzhaf*:

"The public health standard removes much of the vagueness and over-breadth attending the standard of the public interest. But we are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. Even the relatively precise concept of the public health is murky at the fringes, and in some cases what is concededly optimal health may be a less important public value than other conflicting interests." *Banzhaf, supra* at 1097.

Clearly, the issue of atmospheric pollution by internal combustion engines and gasoline fits squarely within this Court's admonition.

Thus, the Commission recognized that unlike automobiles, cigarette smoking did not involve a balancing of competing interests (App. 29). Cigarette smoking is habit-forming and the Government was urging people to stop smoking or not to start. In such a context, a campaign of announcements made some sense. But this is not true in the case of automobiles or gasoline, which have social utility, will continue to be used, and are not "habit-forming." As the Commission said "... the Government is not urging people to stop *now*—without any delay—buying or using gasoline-engine automobiles. . . . The benefits and detriments here are of a more complex nature, and do not permit the simplistic approach taken as to cigarettes."

(App. 79). Overriding social and economic considerations must be taken into account in dealing with automobile pollution. Such was not the case with cigarettes. The importance of the automobile to our social and economic progress requires the consideration of approaches other than a ban on using automobiles, for example, the enforcement of emission standards and the development of new propulsion systems. The Commission stated that "the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising aspects." (App. 80).

Summarizing its position, the Commission stated:

"No one proposes to stop promoting or using the fruits of the technological revolution (*e.g.*, to stop all use of autos or trucks); rather, we are recognizing that we must take prompt action to come to terms with the environmental effects of that technology." (App. 79).

The action to which the Commission was referring is exemplified by the vast network of complex federal and state air pollution legislation, including specific legislation directed at motor vehicle exhaust emissions. Indeed, recently enacted federal legislation requires the development of a virtually pollution-free automobile.⁸ Petitioners' simplistic approach fails to take account of this vast complex of federal and state legislation.

C. The Commission's Ruling Is Not Vulnerable to the Technical Objections Raised by Petitioners

Petitioners go to great efforts in an attempt to show that the Commission obfuscated or confused the issues raised by their complaint in its documented, well-reasoned decision refusing to extend its ruling in the cigarette case to the product advertisements specified by petitioners. Not

⁸ See the *Clean Air Act*, as amended by P.L. 91-604 (December 31, 1970), 42 U.S.C. § 1857 *et seq.* Practically every state has passed air quality standards.

only do these efforts fall far short of the required demonstration that the Commission's holding has produced an unreasonable result (*McCarthy v. FCC*, 129 U.S. App. D.C. 56, 390 F.2d 471 (D.C. Cir. 1968)), but they do not even show the existence of the type of error found to be "harmless" in *Greater Boston Television Corp. v. FCC*, No. 17,785 (D.C. Cir., Nov. 13, 1970).

The basic errors ascribed to the Commission by petitioners are (i) an alleged failure to consider the complaint in the context of the local conditions of the broadcaster's community, New York City (Pet. Br. pp. 25-26); (ii) an alleged failure to consider the advertisements cited in the complaint (Pet. Br. pp. 26-29), and (iii) an alleged failure to respond to petitioners' allegations that WNBC-TV may have been subjected to undue pressures by its advertisers (Pet. Br. p. 23).

(i) *The Commission's Consideration of Local Conditions*

The contention that the Commission failed to consider the complaint as it related specifically to New York City is not supported by the record. While petitioners never specifically requested that their complaint be treated solely in the context of the automobile pollution problem as it affects New York City (indeed, the letter of complaint concludes that the Commission has a duty to contribute to the effort to "abate automobile pollution in *America*" (App. 10) (emphasis added)), the Commission, nevertheless, did so consider the complaint. Thus, the opinion of the Commission noted New York City's submission relating to "the pollution problems caused in New York City by autos and use of leaded gas" (App. 76) as well as the supplemental letter dated July 30, 1970, submitted on behalf of Friends of the Earth, which described "the health hazard crisis created by New York City's automobile-produced air pollution." (App. 76).

(ii) *The Specific Advertisements Considered*

Petitioners' argument that the Commission violated its procedures by failing to consider the commercial advertisements which were the subject of their complaint is negated by the fact that even the petitioners referred this Court to the Commission's decision for "a good description of the advertisements cited." (Pet. Br. p. 27). The Commission specifically stated and recognized that petitioners' complaint was directed toward:

"... auto and gas advertisements (particularly those for large-displacement engines and lead additive gasolines) [which] generally convey a message that such products (and necessarily the pollution they cause) are a requirement for the full rich life. The automobile commercials extol the virtues of large car size, 'be a big rider,' '4-barrel V-8' engines and 'up to 429 cubic inches' and imply that automobiles are consonant with an unpolluted environment (*e.g.*, by showing an automobile on a clean beach), thus, it is argued, representing one side of a controversial issue of public importance..." (App. 75).

The above-cited recitation puts the lie to any claim that the Commission failed to consider the specific advertisements complained of. The fact that the Commission, in its discussion extended its consideration to general guidelines on the treatment of product advertising and environmental issues and adverted to other advertisements of a similar nature, does not alter this conclusion.⁹ Petitioners do not assert that the advertisements referred to by the Commis-

⁹ The Commission found that "it would be inconsistent with the public interest to ban these commercials, have them contain health hazard announcements, or require announcements geared in some ratio to these ordinary product commercials" (App. 86) in light of the fact that "a great many products have some adverse ecological effects" (App. 83). Absent the exceptional circumstances present in the *Banzhaf* case, the opposite finding would open the door to claims that innumerable commercials raise controversial issues of public importance, giving rise to a right for time to reply.

sion in its general discussion (e.g., "put a tiger in your tank") imply anything less than the specific advertisements complained of. Indeed, petitioners' formal complaint to the Commission indulged in the same exercise where it referred to and complained of a particular Esso advertisement (App. 8) which was not one of those specifically cited as violating the fairness doctrine. (App. 15).

As with their contention that the Commission failed to consider the complaint in the context of the New York City area (Point C (i) above), petitioners argue that the Commission had an obligation to consider their case *in vacuo* and to confine the language of its opinion solely to the facts before it. Such an argument completely misconstrues the nature of the Commission's responsibility as the agency which licenses all broadcast stations. In deciding questions such as the instant one, the Commission can reasonably expect that the guidelines issued by it or by the Court will be applicable to broadcast licensees throughout the United States. In the *Cigarette Ruling*, a complaint against WCBS-TV, a local New York City station, resulted in a general policy concerning advertising of cigarettes applicable to *all stations*. There, the Commission stated that the ruling "constitutes a precedent on an important issue which will affect licensees other than WCBS-TV" (9 F.C.C. 2d at 923, 11 P & F Radio Reg. 2d at 1906) and ordered that copies of its decision be sent to all licensees. (9 F.C.C. 2d at 950, 11 P & F Radio Reg. 2d at 1938).

Petitioners undoubtedly hope by this case to establish a general rule applicable to all broadcast stations. In light of this, the Commission's general discussion of the question of product advertising and its relation to the environment is neither ground for reversal nor unusual.

(iii) *The Commission's Consideration of the Alleged Economic Pressures on WNBC-TV.*

Finally, petitioners' argument that the Commission dismissed "out of hand" their charge that WNBC-TV acted

out of fear of economic reprisal in refusing to accept their anti-automobile advertisements (Pet. Br. p. 23 n. 27) is not supported by the record or by the cases cited by petitioners in their brief.

The "evidence" referred to by petitioners consisted of three alleged instances of advertiser pressure. The first was a clipping from the *New York Times* concerning a meeting of representatives of an orange juice supplier with NBC over material included in an NBC documentary on migrant workers. As the Commission noted in its opinion, the matter was under study by the Commission. NBC's response to the Commission on this matter was that as a result of the meeting only two minor clarifying changes were made in the script "which did not in any way alter the thrust, meaning or impact of the program or its treatment of the condition of migrant workers." (Letter of Aug. 6, 1970 to William B. Ray (FCC File No. 8300 C7-1268)).

The second was an article from *Advertising Age* which stated that NBC decided some Excedrin commercials were misleading and should not be run on the network; as a result Bristol-Myers stopped buying time on NBC.

The third was a reference to a speech by Representative Leonard Farbstein on July 29, 1970 in the House of Representatives in which he allegedly described pressure which Procter and Gamble brought to bear on WNBC-TV in May, 1969 after the station carried a news program in which Bess Meyerson Grant criticized the deceptive pricing practices of Mr. Clean. No such speech by Representative Farbstein appears in the Congressional Record of July 29, 1970. A speech of Representative Farbstein does appear in the Congressional Record of July 30, 1970, but it contains no references to any such broadcast by WNBC-TV or activity of Procter and Gamble. NBC has no present knowledge as to whether such an incident occurred.

It thus appears that in all of the alleged instances cited

by the petitioners, the action of NBC was taken regardless of commercial considerations. The Commission did not dismiss the charges "out of hand," it found rather that broadcasts such as NBC's *Migrant Workers* program typify the commitment to "robust, wide-open debate" on issues of great importance upon which this country depends (App. 87).

The extent of this commitment on the pollution problem has recently been recognized by the prestigious and traditionally critical Alfred I. duPont-Columbia University, *Survey of Broadcast Journalism* (1970), where it was stated:

"The broadcasters' eagerness and ability to serve the public was as consistently demonstrated by this year's coverage of the environmental crisis as by anything in their fifty-year history. This was even more impressive when one took into account the possibility that such coverage, if it remained honest and achieved its avowed ends, could weaken the broadcasters' financial base. This possibility, of course, derived from the fact that among the nation's principal polluters were many of broadcasting's biggest advertisers. On virtually every serious environmental program names were named; not infrequently the culprits were the broadcasters' own clients." (*Survey of Broadcast Journalism*, 85)

Both of the cases cited by petitioners (*Retail Store Employees Union v. FCC*, No. 22605 (D.C. Cir., Oct. 27, 1970), and *Clarksburg Publishing Co. v. FCC*, 96 U.S. App. D.C. 211, 225 F.2d 511 (D.C. Cir. 1955)) in support of their argument that the Commission should have held a hearing involved license renewals where (i) facts were alleged which supported a conclusion that pressure was being or had been exercised by the advertisers sponsoring the advertising complained of; (ii) where the Commission had the opportunity under Section 309 of the Communications Act (47 U.S.C. § 309) to set the matter down for a statutory hearing of an evidentiary nature and, more importantly,

(iii) where the Commission had "ample reason for extending the inquiry" (*See Clarksburg, supra*, at 515). In effect, the Court found that the Commission had granted summary judgment in these cases when there were unresolved questions of fact which could have been resolved by a hearing.

"Congress could not have expressed in plainer words its intent that, where there are unresolved factual issues, the hearing should be of an evidentiary nature." (*Clarksburg, supra*, 514-15)

In the instant case, any finding of undue influence would properly be dealt with in a separate proceeding since the fairness doctrine does not depend upon WNBC-TV's relationship with its advertisers, but on the content of the program material broadcast.

D. The Commission's Decision Has Not Produced an Arbitrary or Unreasonable Result.

WNBC-TV urges that the record amply demonstrates that the Commission's action in affirming the station's judgment has not produced an arbitrary or unreasonable result. In that regard, it is well established that the function of the court in reviewing an agency's determination is supervisory in nature and is limited to assuring that the agency has not acted in contravention of its statutory authority and that the decision of the agency has not produced an arbitrary or unreasonable result. *Greater Boston Television Corp. v. FCC, supra*. The role of the court is to determine whether there was a rational basis for the agency action.¹⁰

As stated in *Radio Relay Corp. v. FCC*, 409 F.2d 322, 326 (2d Cir. 1969), quoting from *Radio Corp. of America v.*

¹⁰ Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 states that the standard is whether the action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Courts have consistently held that the essence of the concept is "rationality". See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), *Paducah Newspapers, Inc. v. FCC*, 134 U.S. App. D.C. 287, 414 F.2d 1183 (D.C. Cir. 1969).

United States, 341 U.S. 412 (1951), "courts should not overrule an administrative decision merely because they disagree with its wisdom, but only if they find it to be arbitrary or against the public interest as a matter of law." Moreover, the discretion of an agency is particularly broad when it sets enforcement policy and the "burden of establishing a claim of illegality is a heavy one." *Greater Boston Television Corp. v. FCC*, *supra*.

In *Greater Boston*, this Court defined its role in reviewing agency action to be that of assuring "that the agency has given reasoned consideration to all the material facts and issues" (Slip Opinion at 17). Noting that the court's supervisory function dictates its intervention where the agency has not taken "a hard look" at the salient problems and has not genuinely engaged in "reasoned decision making," this Court went on to state:

"If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards." (Slip Opinion at 15).

The facts here indicate that the Commission properly found that the action taken by WNBC-TV in response to petitioners' request for free air time was reasonable and in conformity with both (i) the Commission's guidelines for responding to fairness doctrine requests, and (ii) the station's paramount obligation to operate in the public interest.

II

THE COMMISSION PROPERLY FULFILLED ITS RESPONSIBILITY UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Petitioners rely on the National Environmental Policy Act of 1969 ¹¹ (the "NEP Act") to support their contention

¹¹ 42 U.S.C. § 4331 *et seq.* (1969).

that the Commission should have ordered WNBC-TV to permit them free time to air spot announcements in response to automobile and gasoline advertisements. That this reliance is misplaced is obvious when one considers that (i) the Commission did in fact take into account the policies set forth in the NEP Act before reaching its decision and, more importantly, (ii) the NEP Act was simply not intended to dictate the policy and regulate the decisions of the Commission in the manner proposed by petitioners.

Sections 102 and 103 of the NEP Act provide that each of the various federal agencies must determine how it will comply with the purposes and provisions of said Act. The Commission, recognizing this, stated that its proposed action was the best way to fulfill its obligations under the NEP Act (App. 84). Such a determination having been made, it should not be overridden unless it is clearly unreasonable. *Cf. Philadelphia Television Broadcasting Co. v. FCC*, 123 U.S. App. D.C. 298, 359 F.2d 282 (D.C. Cir. 1966).

The Commission in its opinion (App. 84) took cognizance of the policy of the NEP Act to encourage the Federal Government "to use all practicable means and measures" to insure a harmonious relationship between man and nature and of the requirement that its regulations and policies should be interpreted and administered "to the fullest extent possible" in accordance with the policies of the NEP Act. However, the Commission also noted that Congress did not intend it, in pursuit of a cleaner environment,¹² to

¹² The phrase "to the fullest extent possible" was intended to assure "that no agency shall utilize an *excessively narrow* construction of its existing statutory authorizations to avoid compliance." Conference Report No. 91-765 to accompany S. 1075, 91st Cong., 1st Sess. (1969) (emphasis added). Obviously, then, Congress did not intend to repeal or amend *sub silentio* any other statute.

Moreover, other agencies have reached the same conclusion, *e.g.*:

Department of Agriculture:

"In essence the Section 102(2)(C) process is designed to insure that environmental considerations are given careful at-

disregard its other statutory and constitutional obligations, and the Commission did not do so.

The Commission stated:

"The Act further states that 'to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act' (Section 102). We believe that our action today does so, and that for the reasons set forth in this opinion, it is *Red Lion*—not the cigarette advertising ruling—which should be followed here as the best means

tention and appropriate weight in Federal decision making and actions. This does not mean that environmental values are the only ones to be weighed." *Hearings on the Council on Environmental Quality Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. at 89 (1970).

Atomic Energy Commission:

"The National Environmental Policy Act of 1969 . . . provide[s] that environmental considerations are to be given *careful attention and appropriate weight* in every recommendation or report on proposals for legislation and for other major Federal actions significantly affecting the quality of the human environment." *Id.* at 101 (emphasis added).

Federal Power Commission:

"With respect to the statement of policy and amendments to the regulations under the Natural Gas Act proposed herein, the Commission's objective is to establish procedures which will permit inclusion of considerations relating to overall environmental impact of the applicant's proposal in the total amalgam of factors entering the public convenience and necessity standard of the Natural Gas Act. In achieving this end, the Commission will continue to be mindful of the ever-growing utility service requirements of the Nation's natural gas consumers." *Id.* at 119.

Department of Interior:

"Shall identify and develop methods and procedures, in consultation with the Water Resources Council and the Council on Environmental Quality, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." *Id.* at 131.

of fulfilling our obligations under the 1969 Act." (App. 84).

In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court approved of the Commission's policy of requiring broadcasters to present discussion of public issues which accurately reflect opposing views (395 U.S. at 377), and stated that applying the fairness doctrine to such presentation is "a legitimate exercise" of the Commission's authority (395 U.S. at 385). The Court endorsed the concept of "an uninhibited marketplace of ideas" and the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" (395 U.S. at 390). However, under the Commission's long-standing procedures for implementing the fairness doctrine, approved by the Supreme Court in *Red Lion*, it is the responsibility of the licensee to determine the extent and manner of coverage which will be given to issues of public importance and if the licensee's decision is made in good faith and is not unreasonable, it will be upheld by the Commission. *Fairness Primer*, 40 F.C.C. at 599, 2 P & F Radio Reg. 2d at 1904; *Report on Editorializing*, 13 F.C.C. at 1251-2, 25 P & F Radio Reg. at 1907; *Hon. Oren Harris*, 40 F.C.C. 582, 585-6, 3 P & F Radio Reg. 2d 163, 166-8 (1963).¹³

The decision of the Commission as affirmed by this Court in the *Banzhaf* case does not aid petitioners in their argument that the NEP Act mandates the relief sought herein. In the case of cigarettes, Congress had acted but that action did not regulate the substantive nature of the product.

In the present case, Congress has already acted to protect the public in a substantive way from the dangers of pollution from automobile exhausts by providing for the

¹³ For the Commission to intervene to a greater extent in the programming decisions of a licensee would result in a violation by the Commission of the First Amendment and Section 326 of the Communications Act. See discussion under Point III herein.

promulgation of emission standards for automobile engines. And, as previously stated, recently enacted federal legislation requires the development of a virtually pollution free automobile. See the National Emission Standards Act, 42 U.S.C. § 1857f-1 *et seq.*, as amended by P.L. 91-604 (December 31, 1970). Emission standards were initially prescribed in 1966 and apply, as amended from time to time, to all car models from the year 1968 and later. See 31 Fed. Reg. 5170 (1966), 33 Fed. Reg. 8304 (1968), and 35 Fed. Reg. 17288 (1970). Thus, all current models of automobiles must be regarded as complying with the policies of the NEP Act.

In addition, the Clean Air Amendments of 1970, P.L. 91-604 (December 31, 1970), provide for the control or prohibition of the "manufacture or sale of any motor vehicle fuel or fuel additive if any emissions therefrom will endanger the public health or welfare, or if emission products of such fuel or additive will impair to a significant degree the performance of any emission control device or system which is or will be in general use." Conference Report No. 91-1783 to accompany H.R. 17255, 91st Cong., 2d Sess. at 52 (1970). Thus, Congress has provided for an administrative determination of acceptable levels of emissions from automobiles, both as affected by the automobile engine and the exhaust system and by the fuel used to power the automobile.

Given the fact that Congress has acted directly to protect the environment from automobile pollution, the Commission could properly decide that the extraordinary measures employed in the *Banzhaf* case would not be appropriate here. When First Amendment rights are at stake, as they are in broadcasting (see Point III herein), the course of action involving the least amount of intrusion on such rights is to be taken by the Government. *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967). The Commission took such a course of action here by refusing to prescribe either

how much time should be allotted by WNBC-TV to the discussion of the issue of automobile pollution or the specific format which should be utilized in any such discussion.

Moreover, it is apparent from the legislative history and the text of the NEP Act that petitioners seek unreasonably and illogically to extend the scope of the Act. The concern of Congress was with "the profound impact of man's activity on the interrelations of all components of the natural environment . . . and . . . the critical importance of restoring and maintaining environmental quality." (NEP Act § 101(a)). When declaring that "all practicable means and measures" should be used to protect and enhance the environment, Congress specified "financial and technical assistance." (NEP Act § 101(a)). Clearly then the purpose of Congress was to improve our surroundings by federal action directed at actual causes of pollution, not to indulge a penchant for arcane ramifications or strained interpretations.

This is confirmed by the list of agencies¹⁴ regarded by the Council on Environmental Quality as having, within the meaning of Section 102(2) of the NEP Act, "jurisdiction by law or special expertise" to comment upon the environmental impact of proposed actions. The agencies listed include, among others, the Atomic Energy Commission, the Federal Power Commission, the Tennessee Valley Authority and components of the Departments of Agriculture, Defense, Health, Education and Welfare, and Transportation—agencies which might reasonably be expected to be aware of the environmental impact of any proposed action within their jurisdiction. If, for example, the Atomic Energy Commission were planning to construct or to approve construction of a new reactor or if the Tennessee Valley Au-

¹⁴ A copy of the list and a covering memorandum is printed in *Hearings on the Council on Environmental Quality Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2nd Sess. at 81 ff. (1970).

thority were planning to build a new dam, the Act would require the responsible agency to prepare a statement on the environmental impact of its actions.

So, also, the subject areas of expertise considered by the Council on Environmental Quality in compiling its list of agencies indicate that the Commission is not mandated by the NEP Act to reach the decision which petitioners seek. Thus, the areas of expertise listed in the memorandum include air quality and air pollution control,¹⁵ disease control, mineral land reclamation, pesticides and wildlife.

Predictably, the Commission is not included among those agencies having either jurisdiction or special expertise to deal with complex questions of environmental impact. Congress recognized this fact and the Commission confirmed it when it stated in its opinion:

"We are not the experts here. It may be that a program of limiting advertising on the basis of pollution considerations would also be a helpful, transitional tool, just as taxation is presently being proposed. See, e.g., President's Message on new taxes on non-leaded gasoline, February 10, 1970. If so, here again the matter is one for consideration by Congress—not this agency which is not and cannot be the arbiter of such matters." (App. 84-5).

In summary, we admit and the Commission itself recognized (App. 83-84), that the NEP Act makes clear that environmental pollution is a significant issue of public importance. However, on that issue, there is no disagreement among the parties; WNBC-TV in fact gave "significant coverage" to the issue, as shown by the many examples of programs it broadcast on environmental problems.

¹⁵ The agencies listed under this heading are components of the Departments of Health, Education and Welfare, Commerce, Interior and Transportation.

III.

**THE FIRST AMENDMENT REQUIRES THAT THE
LICENSEE, NOT THE COMMISSION, DETERMINE
WHETHER A CONTROVERSIAL ISSUE OF
PUBLIC IMPORTANCE HAS BEEN RAISED**

In its brief in support of petitioners herein, Citizens for Clean Air, Inc. (hereinafter "Citizens") contends that the Commission's permitting the licensee to exercise discretion to determine what broadcast messages raise controversial issues of public importance violates the First Amendment. Citizens asserts that, instead, the Commission "must in each instance stand in the licensee's shoes and decide . . . whether a controversial issue of public importance is involved . . . [I]n each instance where a request for broadcast time is made based on a fairness issue, the licensee's judgment is subject to *de novo* review by the FCC and any reviewing court." (C. Br. p. 28). While this point was not presented to the Commission and therefore is not properly before this Court on Petition for Review (see 47 U.S.C. § 405), NBC will nevertheless respond to Citizens' argument.

The position taken by Citizens clearly misconstrues the nature of the First Amendment rights at stake in broadcasting.¹⁶ We begin with the observation that the First Amendment prohibits *governmental* interference with the rights of free speech and a free press. In *Bates v. City of Little Rock*, 361 U.S. 516 (1960), the Supreme Court stated that freedom of speech and a free press "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." 361 U.S. at 523. See also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Lovell v. City of Griffin*, 303 U.S. 444

¹⁶ That the protection afforded by the First Amendment extends to broadcasting was made clear in *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948).

(1938), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

The question which arises when First Amendment rights are at stake is how much governmental intervention is permissible, not how little. As the Court stated in *Near v. Minnesota*, 283 U.S. 697, 721 (1931):

"The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship."

Citizens characterizes the determination of whether a controversial issue of public importance is involved in a particular advertisement or program as a "narrow question", thus implying it is one which would not unreasonably extend the Commission's involvement in programming (C. Br. p. 27). The fact is that this is one of the several questions the answers to which are the essence of the determination of what programs and views will be broadcast. If the Commission were to determine the answer to these questions, as desired by *Citizens*, then, in effect, it would be the Commission which would in every instance be the body which would decide whether or not to broadcast a particular program or to allow a particular group or indi-

vidual to use its facilities. Obviously, if essential questions decided by a broadcaster were adverse to any complainant, and the Commission decided them *de novo*, appeal of adverse decisions would become routine. Under such a system the Commission would in fact be dictating what programs and views would be broadcast. Not only would the Commission always determine whether an individual or group could broadcast its views, but, given the fact that only a limited number of programs can be broadcast by any one station on any day, the Commission would have to decide which of the available programs should be broadcast.

Such a system would fly in the face of the explicit Congressional direction against regulation of program content as set forth in the Communications Act, 47 U.S.C. § 326.¹⁷ The Commission has from the beginning of the fairness doctrine, refused to make these determinations *de novo*, but has correctly confined its review to the question of the good faith and reasonableness of the broadcaster. *Report on Editorializing, supra*, 13 F.C.C. at 1251-6, 25 P & F Radio Reg. at 1907-11. This was the cornerstone of the fairness doctrine approved in *Red Lion, supra*.

The concept of free speech and a free press necessarily carries with it the existence of discretion on the part of the publisher or broadcaster with respect to the content of the

¹⁷ Section 326 of the Communications Act provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Citizens would for all practical purposes make broadcast licensees "common carriers" despite the express language of the Communications Act which states that "... a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." (47 U.S.C. § 153(h)). See, *Mass. Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

publication or broadcast. The compulsion of particular expression which would result from the adoption of Citizens' position, would be as much an encroachment on free expression as is the suppression of particular views. See, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

As this Court stated in *Banzhaf v. FCC*, *supra*:

"We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition." (405 F.2d at 1103)

In the field of broadcasting, the nature of the medium makes some government regulation necessary since only a limited number of persons can broadcast intelligibly at the same time. *Red Lion*, *supra*, and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). However, this is not to say that the limited regulatory system must impose a censorship in contravention of the requirements of the First Amendment and of the Communications Act of 1934 itself. This would occur if the Commission were to do more than appraise the reasonableness and good faith of the licensee's determination as to the existence of a controversial issue of public importance.

Citizens refers (C. Br. p. 28) to the passage from *Banzhaf v. FCC*, *supra*, that "in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little." (405 F.2d at 1095). However, the implications of this passage have been ignored by Citizens. In *Banzhaf*, this Court, even though affirming the decision of the Commission in that case, was warning of "the dangers of censorship or pervasive supervision" arising from the consideration of program content by the Commission and recognizing as well that there must not be an "impermissibly broad intrusion upon a licensee's individual responsibility for program-

ming." (405 F.2d at 1096). Moreover, the Court made it clear that its upholding of the cigarette ruling of the Commission "neither forbids nor requires the publication of any specific material." (405 F.2d at 1096).

"The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.

"The cigarette ruling does not convert the Commission into either a censor or a big brother." (*Banzhaf, supra*, at 1099).

Nor does *Red Lion, supra*, provide support for Citizens' contention. In upholding the validity of the fairness doctrine, the Court made clear its awareness of the constitutional and statutory limitations upon the authority of the Commission. Thus, it was noted that the Commission's rules and regulations "fall short of abridgement of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act." (395 U.S. at 382). Moreover, the Court ruled that the Commission must not be "left with a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech." (395 U.S. at 395).

Specific regulations, like those concerning personal attack and political editorializing at issue in *Red Lion*, prevent the development of "unlimited private censorship operating in a medium not open to all." (395 U.S. at 392). At the same time, however, day-by-day supervision by the Commission, as espoused by Citizens, would entail the very type of government censorship which was disavowed in *Red Lion, supra*.

The real control of the Commission over broadcasters lies in the licensing power of the Commission. It is at the time of issuing or renewing a broadcast license that the

Commission properly determines whether the broadcaster has given and will give "suitable time and attention to matters of great public concern." *Red Lion, supra*, at 394.

In summary, both the broadcaster and the Commission have determined that automobile and gasoline advertisements do not give petitioners a right to freetime to reply. Absent a clear abuse of discretion by each of these two parties, their respective decisions should stand. To hold otherwise would endanger free speech and freedom of the press in broadcasting by creating in the words of *Red Lion, supra*, at 396, "an official government view dominating public broadcasting."

CONCLUSION

For the reasons above stated, the decision of the Federal Communications Commission should be affirmed.

Respectfully submitted,

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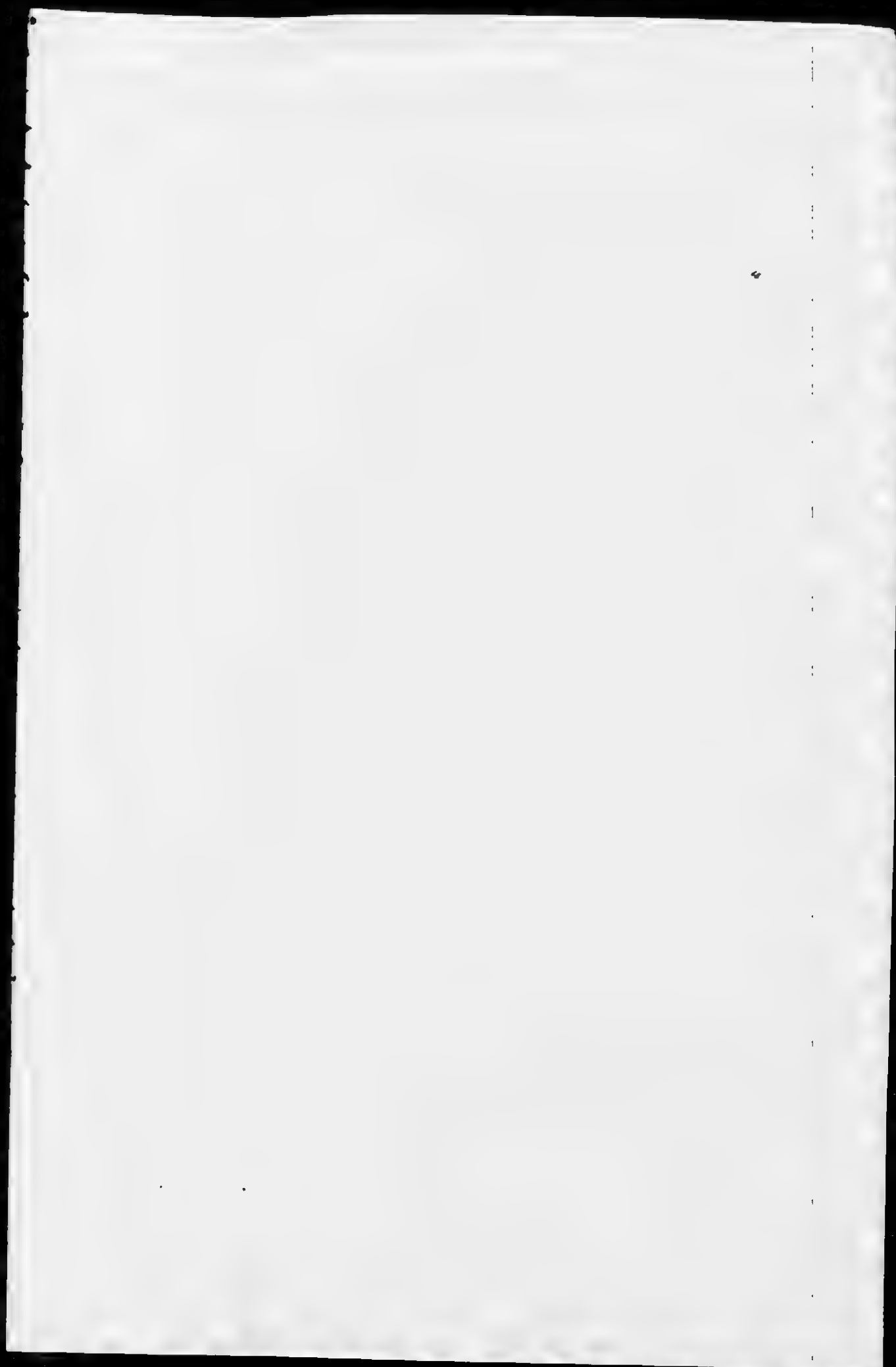
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,556

FRIENDS OF THE EARTH, and
GARY A. SOUCIE,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

CITIZENS FOR CLEAN AIR, INC., NATIONAL
BROADCASTING COMPANY, INC.,

Intervenors.

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT:	
I. The FCC Brief Reinforces Complainants' Contention that the Commission's Procedural Irregularities in this Case Require Reversal	1
A. There is no support in the record for the Commission's "crucial finding" in this case	3
B. The Commission's attempted justification for its failure to consider facts relating to New York City, as is routinely required in fairness doctrine cases, is unsupported by the record	5
C. The briefs for the FCC and NBC do not dispute Complainants' allegations that automobile and gasoline commercials present one side of a controversial issue of public importance	7
D. The Commission's finding that WNBC-TV is broadcasting a "significant amount of automobile air pollution information" is unsupported by the record	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

* <i>Banzhaf v. F.C.C.</i> , 132 U.S. App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969)	3
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156, 168 (1962)	2
<i>Environmental Defense Fund, Inc. v. Hardin</i> , No. 23,813 (D.C. Cir. May 28, 1970)	2

*Cases chiefly relied upon.

(ii)

	<u>Page</u>
*Greater Boston Television Corp. v. F.C.C., No. 17,785 (D.C. Cir. November 13, 1970)	5
Medical Committee for Human Rights v. S.E.C., No. 23,105 (D.C. Cir. July 8, 1970)	2
Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236; 230 F.2d 204 (D.C. Cir. 1956)	2
*Retail Store Employees Union v. F.C.C., No. 22,605 (D.C. Cir. October 27, 1970)	7, 10, 11
<i>Miscellaneous:</i>	
*Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C. 2d 921 (1967)	11

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ARGUMENT

- I. THE FCC BRIEF REINFORCES COMPLAINANTS' CONTENTION THAT THE COMMISSION'S PROCEDURAL IRREGULARITIES IN THIS CASE REQUIRE REVERSAL.

Both the brief of respondents and that of the intervenor, National Broadcasting Company (hereinafter "NBC") are based on the explicit assumption that the crucial issue in

the case is whether the Commission had discretion to refuse "to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials" (Resp. Br. p. 11; NBC Br. p. 10-11). On the contrary, the crucial issues in this case, as stated in our main brief (pp. 15, 29), are:

1. Did the Commission's opinion and ruling violate basic principles of administrative practice and depart from the court-approved procedures heretofore established in Fairness Doctrine cases; and
2. Do the advertisements of WNBC-TV cited in the complaint present one side of a controversial issue of public importance?

We do not question the Commission's power to modify or refuse to follow a past decision. As we noted in our main brief, it has long been settled law that agencies have the power to change or modify their standards as events or even new personnel demand (Br. pp. 15-16). But the point which the Commission and NBC fail to grasp is that such changes or modifications must be based on clear reasoning articulated in the Commission's opinions and rulings, rather than on whim or prejudice. The Commission has a duty to set forth the rationale which supports each of its rulings with sufficient clarity to be examined by a reviewing court (*Medical Committee for Human Rights v. S.E.C.*, No. 23,105 (D.C. Cir. July 8, 1970) (slip op. at 41-42); *Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 11)), and the decision must be supported by appropriate findings of fact, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The rationale for the agency's ruling must be particularly clearly enunciated when, as here, that ruling modifies or departs from past standards, *Pinellas Broadcasting Co. v. F.C.C.*, 97 U.S. App. D.C. 236, 238; 230 F.2d 204, 206 (D.C. Cir. 1956).

As we pointed out in our main brief (pp. 37-38), the Commission's opinion is filled with unsubstantiated findings which, in any case, have no discernible relevance to the Commission's decision. We speculated (e.g. Br. p. 25-26)

that these failures of fact-finding stemmed at least in part from the Commission's refusal to follow its own established procedures for deciding Fairness Doctrine cases. The Commission's brief reinforces this conclusion.

A. There Is No Support in the Record for the Commission's "Crucial Finding" in this Case.

Displaying almost total disregard for the requirements of the administrative process, the FCC brief repeatedly¹ asserts that "the Commission's crucial finding" was:

"... that the complexities of the pollution problem made inappropriate the simplistic approach taken with respect to cigarettes." (Resp. Br. p. 15)

Respondents assert that our brief failed "to come to grips" with this "finding" (Resp. Br. p. 15).

Unfortunately, what the Commission now calls a "finding" was nothing more than an unsubstantiated conclusion in the opinion below, which has no support in the record.² According to the brief,³ the Commission's "finding" is

¹Virtually identical passages appear in respondents' brief at pages 14, 15 and 19.

²The Commission cites no source for its "finding," nor can the finding be attributed to the Commission's expertise. Both the Commission and this Court have emphasized that the Commission has no expertise in matters involving scientific and other specialized knowledge, and must therefore rely on the judgment of government officials and appropriate private groups. See *Banzhaf v. F.C.C.*, 132 U.S. App. D.C. 14, 29-30 n. 64; 405 F.2d 1082, 1097-8 n. 64 (D.C. Cir. 1968) cert. denied, 396 U.S. 842 (1969). To support its contention that automobile and gasoline commercials present one side of a controversial issue of public importance in New York City, petitioners relied on official statements of the appropriate public officials including Mayor Lindsay, the Environmental Protection Administration of New York City, and Mayor Lindsay's Task Force on Air Pollution.

³"As the Commission found here (A. 79, 81), pollution issues do not lend themselves to such simplistic treatment." (Resp. Br. p. 14). Two virtually identical statements of this position appear at App. 79, and a third similar statement appears at App. 81.

described in three separate but almost identical passages of the opinion. In one of these passages the Commission states (App. 79):

“... the Government is not urging people to stop *now*—without any delay—buying or using gasoline-engine automobiles The benefits and detriments here are of a more complex nature, and do not permit the simplistic approach taken as to cigarettes.” (footnote omitted)

The Commission, however, cites no source for its finding that the government is not urging people to stop using automobiles, and no source for that contention appears in the record. On the contrary, as we pointed out in our main brief (p. 26):

“... the record was filled with references to statements by Mayor Lindsay and other public officials, urging drivers in New York City, where possible, to stop using cars at once—to walk or form car pools or use mass transit instead (App. 7, 28, 31, 37, 42, 57-58, 68-69).”

Thus, what the Commission calls its “crucial finding” was not only unsupported by *any* evidence, but was in clear disregard of the only evidence in the record before it.

Furthermore, even though the solutions to pollution problems be complex, the Commission’s “crucial finding” amounts to a *non sequitur*. Neither the Commission’s opinion nor its brief explain why the Fairness Doctrine should not apply to complicated as well as to simple problems. As we pointed out in our main brief (p. 38):

“Based on past Commission and court decisions . . . one would expect the public interest to require that a licensee present more, rather than less information about a complex issue.”

Nor is it clear why the Commission considers the complexity of the issues relevant at all. As the dissenting Commissioner explained:

"The question is not whether pollution of the lung differs from pollution of the air, or whether the products are manufactured or used differently, but whether advocacy of their use raises an issue of controversy and public importance sufficient to invoke the fairness doctrine." (App. 91)

The Commission's failure to explain its reasoning is, we submit, reversible error. "The function of the court," Judge Leventhal recently pointed out,

"is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." *Greater Boston Television Corp. v. F.C.C.*, No. 17,785 (D.C. Cir. November 13, 1970) (slip op. at 17-18).

In an area as sensitive as commercial advertising and its impact on the environment, careful judicial scrutiny of the reasoning of Commission decisions is especially important. Again to quote Judge Leventhal,

"Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice." *Greater Boston Television Corp. v. F.C.C.*, *supra*, (slip op. at 19-20).

B. The Commission's Attempted Justification for Its Failure To Consider Facts Relating to New York City, as Is Routinely Required in Fairness Doctrine Cases, Is Unsupported by the Record.

Apparently the Commission felt free to ignore the abundant evidence in the record regarding automobile pollution in New York City. The FCC brief states that "it is not possible to read the complaint filed with the Commission

as relating only, or even primarily, to New York City as distinguished from other cities." (Resp. Br. p. 22) Additionally, the FCC brief states that the circumstances in New York City are irrelevant:

"It would not have affected the decision for the Commission to have restricted its ruling to one city." (Resp. Br. p. 22)

Yet as our main brief points out, in the past the Commission has always held that Fairness Doctrine complaints must be considered in their local context, except in those cases where local circumstances were irrelevant (Br. pp. 16-20). Local circumstances were clearly relevant to the issues in this case. For example, both the FCC (App. 86-87, n. 9) and NBC (NBC Br. p. 13) admit that the health hazard caused by automobile pollution is much more serious in New York City than in most communities, and neither denies that government leaders in New York City have been unusually persistent in suggesting that, where possible, people should shift to other methods of transportation. The FCC does not explain why a complaint filed by citizens in New York City should be treated no differently than a complaint filed by residents of Boise, Idaho.

The Commission's failure to understand that the complaint related "only, or even primarily to New York City" (Resp. Br. p. 22) is baffling. The complaint was filed by a man who explained that he was acting "on behalf of myself, as a New York resident whose health and happiness has been affected by automobile pollution" (App. 14).⁴ The complaint was supported by Citizens for Clean Air, Inc., which intervened and described itself as "a New York membership corporation organized in 1965 for the purpose of educating the public—and particularly residents of the Greater New York metropolitan area" (App. 41). The complaint was given "strong support" in a lengthy letter to the FCC from

⁴This statement appears in Mr. Soucie's February 6, 1970 letter to WNBC-TV, which was "made a formal part of this complaint" in Mr. Soucie's March 14, 1970 letter to Dean Burch (App. 2).

the Environmental Protection Administrator of the City of New York (App. 27).⁵ Moreover, as we noted in our main brief (pp. 34-36), the record is replete with statements from New York City officials and with quotations from carefully documented government and private reports which set forth the dimensions of the health crisis caused by automobile pollution in the New York City area.

C. The Briefs for the FCC and NBC Do Not Dispute Complainants' Allegations That Automobile and Gasoline Commercials Present One Side of a Controversial Issue of Public Importance.

Our main brief pointed out that the Commission normally invokes the Fairness Doctrine when programing presents one side of a controversial issue of public importance (Br. pp. 16-18). The Commission, however, has been reluctant to invoke the Fairness Doctrine when the issue is discussed in a commercial advertisement. The principal reason for this reluctance, as this Court recently noted, is the fact that most advertisements don't deal with controversial issues of public importance. In *Retail Store Employees Union v. F.C.C.*, No. 22,605 (D.C. Cir., October 27, 1970), *supra*, this Court explained:

"... although the Commission repeatedly emphasized that its holding in that [cigarette advertising] case ... was limited to cigarette advertising, the reasons advanced by the Commission to support that limitation seem to us not to imply that other advertisements may not carry an implicit as well as an explicit message, but rather that the implicit and explicit messages normally carried by advertising do not con-

⁵The Commission's suggestion that petitioners should have asked for a rehearing under 47 U.S.C. §405 (Resp. Br. p. 22) is plainly a makeweight. A petitioner is only obliged to ask for a rehearing when his appeal "relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass." 47 U.S.C. § 405. No such questions are raised in this appeal.

cern controversial issues of public importance." (slip op. at 20-21).

Automobile and gasoline advertisements in New York City indisputably are concerned with controversial issues of public importance. While the Commission has made no effort to define every kind of advertisement which should be construed as raising such issues, both it and this Court have held that controversial issues of public importance are presented by advertisements for products which, in normal use, "can be a hazard to the health of millions of people." (Br. p. 36; App. 4-7, 12). Advertisements for such a product implicitly or explicitly present one side of a controversial issue of public importance, the Commission has held, because they necessarily promote the purchase and use—and emphasize the desirability—of a product which may have catastrophic adverse consequences in normal use.

Most of the material placed in the record by plaintiff establishes the fact that because of the air pollution crisis in New York City, automobiles and gasoline (and especially high-powered automobiles and high octane gasoline) are such products (Br. pp. 34-36). Interestingly, neither the FCC nor NBC dispute this fact. Instead, their argument is confined to the question of remedy. The FCC brief repeatedly argues that it would be inappropriate for the Commission to apply the kind of "special remedy" (e.g. Resp. Br. p. 14) which the Commission "fashioned" in the cigarette ruling. As we explained in our main brief (p. 45, n. 45), the petitioners did not ask for any specific remedy.⁶ In

⁶Our complaint concluded with the following prayer:

"We therefore formally complain that WNBC-TV has broadcast and appears to be continuing to broadcast a large number of messages presenting only one side of a controversial issue of public importance, and that they have refused a proper and reasonable request to make corresponding free time available for messages presenting contrasting viewpoints. We specifically request that this complaint be investigated and that necessary and appropriate action be taken to bring WNBC-TV into compliance with the requirements of the Federal Communications Act." (App. 10)

any event, we submit that questions of remedy or relief are not now before this Court.

D. The Commission's Finding That WNBC-TV Is Broadcasting a "Significant" Amount of Automobile Air Pollution Information Is Unsupported by the Record.

The Complaint alleged that New York area viewers of WNBC-TV are constantly bombarded with programing urging them to buy and use automobiles and gasoline (especially large engine cars and high octane gasoline), which are described as desirable and an indispensable part of the full rich life (App. 11). Yet, we submit, WNBC-TV broadcasts virtually no programing presenting the other side of this issue (App. 9-10, 59-60), despite the fact that New York City officials have, as we emphasized in our main brief (pp. 34-36), urged New York area residents to stop using automobiles, where possible.

According to the FCC brief, the Commission "found that there had been no indication on this record of a failure" to present programing "designed to reach the relevant audience." (Resp. Br. p. 20). This "finding" does not square with the record. Complainants examined the programs which WNBC-TV contends deal with environmental issues (App. 19, 44-55), and presented the Commission with an analysis of those programs which, complainants contended, showed that most of the programs listed by WNBC-TV had nothing to do with air pollution, and that "WNBC-TV has broadcast virtually no . . . information" about the "health hazards of automobile-produced air pollution, and the steps which concerned voters, consumers, and merchants can take." (App. 9-10, 59-60) This analysis was undisputed in the record.

While recognizing that complainants "challenge(s) the adequacy of the WNBC-TV efforts in this area of air pollution" (App. 88), the Commission's opinion proceeds to

give the station a clean bill of health. The opinion states that:

"... NBC submitted only an example showing in this area, and that showing does indicate significant coverage of the issue." (App. 88)

We submit that in view of complainants' documented challenge of NBC's "example showing" (App. 9-10, 59-60), the Commission should not have accepted the accuracy of NBC's showing at face value.⁷ As this Court has recently observed:

"... the Federal Communications Commission was intended by Congress to function as far more than a mere referee between conflicting parties. Regardless of the formal status of a party, or the technical merits of a particular petition, the FCC 'should not close its eyes to the public interest factors' raised by material in its files." *Retail Store Employees Union v. FCC, supra*, slip opinion at 11 (footnotes omitted)

The Commission could easily have checked the accuracy of NBC's claims by following complainants' suggestion that:

"... the Commission . . . request that WNBC-TV supply it with transcripts of the programs it has cited, and makes copies . . . available to FOE and [New York City Environmental Protection Administrator Jerome] Kretchmer for comment." (App. 64)

Mr. Kretchmer also asked for:

"... the opportunity to review WNBC-TV's programming in this regard and if appropriate [to] present [the Environmental Protection Administration's] views to the Commission." (App. 28)

There is, of course, no question that the Commission has the power to institute such a review under 47 U.S.C. § 403.

⁷We submit that "on the present record, the undisputed facts raise questions adequately answered neither by the station's explanations nor by the Commission's opinion," *Retail Store Employees Union v. FCC, supra*, (slip opinion at 15).

Furthermore, licensees, the public and reviewing courts may properly insist that the basis on which the Commission determined that the station was providing "significant coverage of the issue" be stated. According to the FCC brief, the Commission "sustained the view largely urged in petitioners' brief that the broadcaster must present programming designed to reach the relevant audience." (Resp. Br. p. 20). Our view, set forth in some detail in our main brief (pp. 45-46), and grounded on the Commission's *Cigarette Advertising* ruling⁸ and the decision of this Court in *Retail Store Employees Union v. F.C.C.*, *supra*, is that NBC's programming on the health hazards of automobiles should be designed to reach as many members as possible of the audience which sees automobiles and gasoline commercials. If the Commission found that NBC's programming accomplished this goal, then the basis of that finding should have been set forth in its opinion. It was not, and by no stretch of the imagination is such a finding warranted on the present record.

The Commission would have complainants wait for two more years, until license renewal time, to challenge the adequacy of WNBC-TV's programming on these vital issues (App. 88). To wait for two more years to make a complaint of such immediate importance would be an injustice to the residents of New York City. The people who live in that community should not be asked to live through another crisis before the Commission takes action.

The purpose of the Fairness Doctrine is to inform licensees of that which will be expected of them when their performance is examined at renewal time. If allowed to stand, NBC at renewal time will be able to say that, in determining its programming in 1971 and 1972, it relied on the Commission's judgment that in 1970 it provided "significant coverage" of automobile air pollution matters. For

⁸See *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921 (1967).

these reasons, we urge that this Court reverse the Commission's ruling.

CONCLUSION

For the reasons stated herein and in their main brief, Petitioners submit that the relief requested in their main brief (p. 47) should be granted.

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February 8, 1971



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REPLY BRIEF FOR INTERVENOR
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TABLE OF CONTENTS

Page

ARGUMENT

- | | | |
|-----|--|----|
| I | THE COMMISSION AND WNBC-TV FAIL TO ADDRESS
THE CENTRAL ISSUE, WHETHER THE MESSAGE
IMPLICIT IN AUTOMOTIVE AND GASOLINE ADVERTIS-
ING GIVES RISE TO A FAIRNESS OBLIGATION | ~1 |
| II | CITIZENS FOR CLEAN AIR MAY QUESTION THE
CONSTITUTIONALITY OF THE COMMISSION'S
DECISION ON APPEAL | 2 |
| III | THE FIRST AMENDMENT REQUIRES, NOT PRECLUDES,
COMMISSION REGULATION OF LICENSEES | 3 |

CONCLUSION

4

I. THE COMMISSION AND WNBC-TV FAIL TO ADDRESS THE CENTRAL ISSUE, WHETHER THE MESSAGE IMPLICIT IN AUTOMOTIVE AND GASOLINE ADVERTISING GIVES RISE TO A FAIRNESS OBLIGATION

Simply put, Citizens for Clean Air's position is that automobile and gasoline advertisements present one side of a controversial issue of public importance---whether or not to purchase internal-combustion-powered automobiles---triggering application of the fairness doctrine. It is conceded by respondents that air pollution is a controversial issue of public importance (FCC Opin., App. 80, 81; FCC Br. 13; NBC Br. 6) and that "a gasoline or automobile commercial which contains a discussion, argument or claim concerning the product's relationship to pollution...may bring fairness requirements directly into play" (FCC Br. 13). Thus, the crucial issue is whether the gasoline and automobile advertisements cited by Mr. Soucie in his complaint present one side of that admittedly controversial issue.

In Banzhaf this Court and the FCC found that advertisements advocated smoking. In Retail Store Employees this Court found that "standard commercial copy" (slip opinion, p.2) advocated customer patronage of a struck store. In both cases, advertisements raised one side of a controversial issue of public importance.

It is beyond dispute, and neither the FCC nor WNBC-TV have disputed, that in this case automobile and gasoline advertisements advocate the use of vehicles that are the major source of air pollution in New York City. It follows that these

advertisements present one side of the issue, i.e., the desirability of automobiles in the New York City metropolitan area,* and hence that WNBC-TV must fairly present the other side.

In Banzhaf the Commission found two "key factors" which distinguished commercial advertisements giving rise to a fairness obligation (CCA Br. 13 et seq.). No one here disputes that those key factors are present in automotive advertising. So-called factual distinctions between cigarettes and automobiles, urged by NBC, are not differences in law; the very nature of the automotive pollution issue militates in favor of fairness treatment for automotive advertising (CCA Br. 18).

The adequacy of WNBC-TV's record of programming on ecology issues was not before the Commission and is not before this Court. To plead it, as WNBC-TV has done at length, is simply to obscure the question, whether automotive product advertising raises a fairness obligation. So does the creation, without precedent or logical basis, of a novel "special" fairness doctrine over and above the "general" fairness doctrine (FCC Br. 12, 14).

II. CITIZENS FOR CLEAN AIR MAY QUESTION THE CONSTITUTIONALITY OF THE COMMISSION'S DECISION ON APPEAL

In its decision, the FCC raised and passed upon the underlying constitutionality of its holding by relying heavily on Red Lion to support its construction of the fairness doctrine. CCA has simply presented its own view of what Red Lion and the

*Although F.O.E.'s complaint focused specifically on New York City, the same considerations apply to other metropolitan areas as well.

First Amendment requires in this case.

Even if the Commission had not passed upon this issue, CCA is still not barred from raising it on appeal. The argument has been amply treated in briefs for this Court by the Commission and WNBC-TV. Moreover, a petition for rehearing on a constitutional objection would surely have been an exercise in futility in light of the FCC's purported "full statement" of its position. In such a case, failure to seek a rehearing does not bar raising the issue on appeal. Cf. Lever v. Anderson, 326, U.S. 219 (1945), Cotherman v. FTC, 417 F. 2d 587, 593 n. 9 (5th Cr. 1969).*

The Commission further urges that there is no factual predicate in this case for CCA's contention that it erroneously limited its review to the reasonableness of the licensee's initial determination of the existence of a controversial issue of public importance. Yet the FCC's own characterization of its ruling is "that...WNBC-TV...had not acted unreasonably...in rejecting petitioners' request..." (FCC Br. 2). **

III. THE FIRST AMENDMENT REQUIRES, NOT PRECLUDES, COMMISSION REGULATION OF LICENSEES

The First Amendment requires regulation of licensees in the public interest, not lack of regulation in the licensee's

*Moreover, to the extent that the Commission determined permissible and impermissible ways of abating automotive pollution, it exceeded its jurisdiction (CCA Br. 20). Objection to a jurisdictional defect cannot be waived.

**See also FCC Br. p. 9, wherein the Commission reiterated that the issues before it presented "complex questions of appropriate action upon which licensee judgment...should not be foreclosed". WNBC-TV similarly characterized the Commission's decision as one "affirming the station's judgment" (WNBC-TV Br. 21), and the record as establishing the "reasonableness of the licensee's judgment" (Id. at 10).

interest. WNBC-TV nevertheless argues that governmental intervention is the evil proscribed by the First Amendment (WNBC Br. 29). This refrain was sung by the networks in Banzhaf and in Red Lion; in Red Lion it was given a decent burial.*

WNBC-TV's concern with censorship and a "free right to reply" to automotive advertising (WNBC Br. 34) is misplaced. No right of any person to rebuttal time is asserted by F.O.E. or CCA. It is the right of the public to hear diverse viewpoints which is at stake here.

No right to dictate the content, timing, source or specific volume of programming is sought. Licensee discretion in these matters is unquestioned. No one wishes to dictate the precise views to be carried by NBC in fulfillment of its fairness obligation. No one has to, for NBC assertedly has had no trouble presenting arguments against polluting motor vehicles.**

CONCLUSION

Regulatory problems of Constitutional magnitude became unavoidable with the creation of the FCC to administer use of the

*395 U.S. at 392: "Otherwise [if rebuttal time were not required to counter political announcements], station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all (emphasis added).

**The Dupont-Columbia Survey quoted by WNBC-TV appears eloquently to praise NBC's ability to present such views. (NBC Br. p. 20)

air waves. Both positive and negative prescriptions may be necessary in furtherance of First Amendment aims. In this case, independently of the fairness doctrine and of Banzhaf, the First Amendment obligates licensees to present balanced programming on controversial issues of public importance. No administrative requirement of the regulatory scheme warrants abrogating the public's Constitutional right through an impermissible delegation of judgment, reviewable solely for "reasonableness". This Court must decide whether automobile and gasoline advertising advocating the purchase and use of internal-combustion-powered cars in the New York area presents one side of an issue acknowledged to be of singular public importance. We believe that it does.

Respectfully submitted,

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IN THE
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No. 24556

**FRIENDS OF THE EARTH and
GABY A. SOUCIE,**

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against

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**AMICUS CURIAE BRIEF FOR THE NEW YORK
CITY ENVIRONMENTAL PROTECTION
ADMINISTRATION**

United States Court of Appeals
for the District of Columbia Circuit

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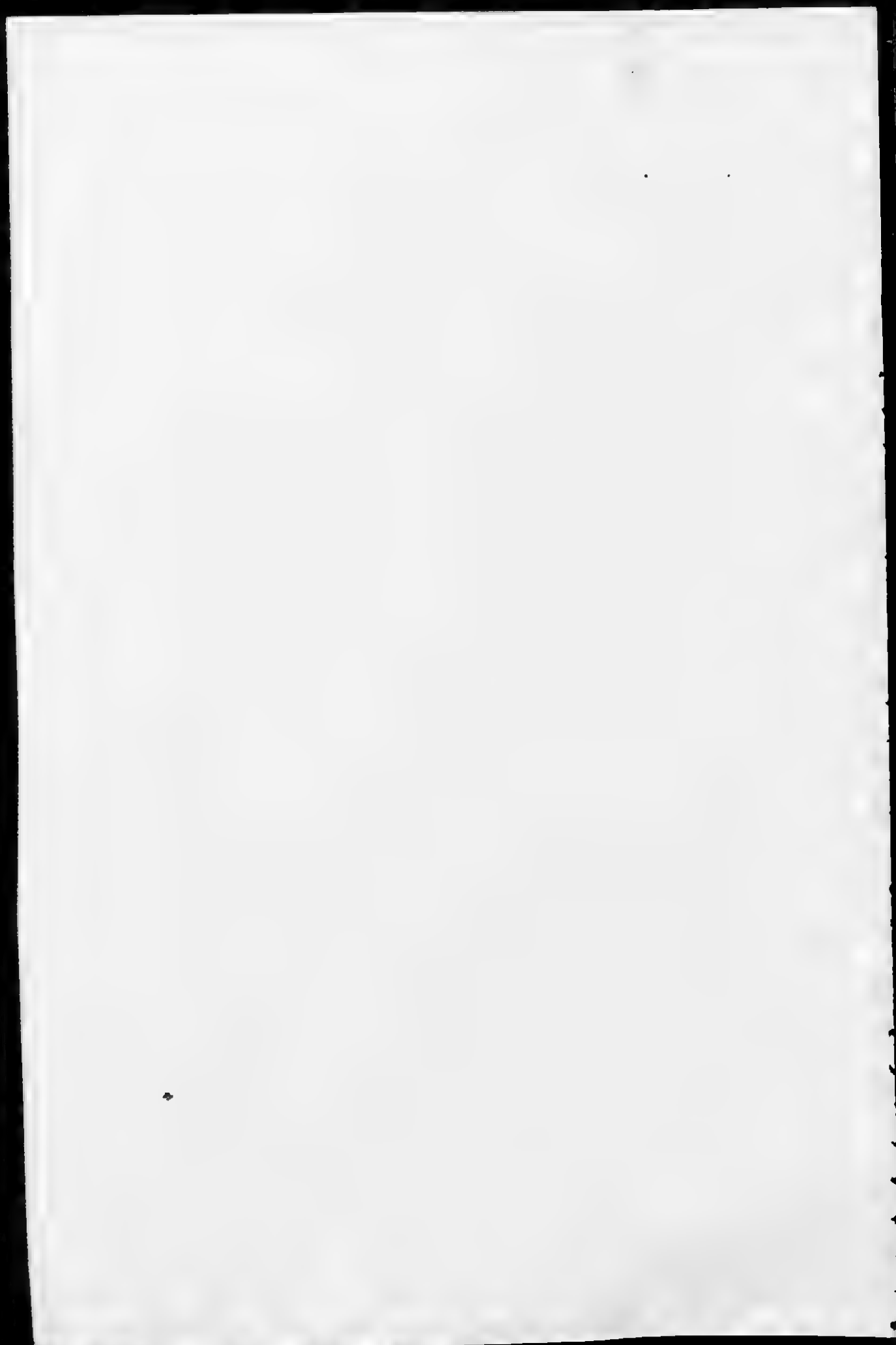


TABLE OF CONTENTS

	PAGE
Motion for Leave to File Amicus Curiae Brief	1
Issues Presented	3
Statement of the Case	3
(a) Proceedings Below	3
(b) Threat to Health and Welfare of New York City Residents Created by the Normal Use of Automobiles and Gasolines	7
(c) The Importance to the Public Welfare of Effective Rebuttal to Automobile and Gasoline Television Advertisements	12
 Argument	
The fairness doctrine and the public interest require provision of free television time for spot advertisements to rebut automobile and gasoline commercials encouraging use of products which create serious health hazards. The Commission's refusal so to hold was arbitrary and an abuse of discretion	14
(a) The Fairness Doctrine as Enunciated in the Cigarette Decision Requires WNBC-TV to Provide Free Television Time for Spot Ad- vertisements Replying to Automobile and Gasoline Commercials	14
(b) WNBC-TV's "Public Interest" Responsibil- ities also Require Free Time for Advertise- ments Rebutting Automobile and Gasoline Commercials	24
(c) Failure to Allow Free Time for Advertise- ments Rebutting Automobile and Gasoline Commercials Deprives the Public of any Meaningful Reply to Such Commercials	26
Conclusion	28

TABLE OF AUTHORITIES

	PAGE
Cases:	
Banzhaf v. FCC, 132 App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), <i>cert. denied</i> , 396 U.S. 842 (1969)	4, 14, 24, 25, 27
In the Matter of Editorializing by Broadcast Licens- ees, 13 F.C.C. 1246 (1949)	21
Memorandum Opinion and Order on the Applicability of the Fairness Doctrine to Cigarette Advertis- ing, 9 F.C.C.2d 921 (1967), <i>aff'd</i> , Banzhaf v. FCC, 132 App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), <i>cert. denied</i> , 396 U.S. 842 (1969)	4, 14, 15, 21, 22, 25, 27
KFKB Broadcasting Ass'n, Inc. v. Fed. Radio Com'n, 60 App. D.C. 79, 47 F.2d 670 (1931)	24
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	20, 23
Retail Store Employees Union v. FCC, — App. D.C. —, — F.2d —, No. 22,605, decided October 27, 1970	15, 21-22, 27
Statutes:	
Air Quality Act, 42 U.S.C. 1857, §§101(a)(2), 103-04, 201-212	16, 17
Communications Act of 1934, 47 U.S.C. §§303(g), 309(a), (d), 315	24
Environmental Quality Improvement Act of 1970, Tit. II of H.R. 4148, 91st Cong., Approved April 3, 1970, §203(d)(4)	17, 19
National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852, §§101, 102	17, 18

	PAGE
Miscellaneous:	
City of Livermore Air Pollution Control Study Committee, <i>Air Pollution—Present and Future</i> (March 1968)	7
Cruse, <i>The Health Implications of Airspace Construction over Highways</i> (January 1970)	9
"Cycling Lane Likely for a Major City Street," New York Times, Sept. 17, 1970, p. 1, col. 6	11
Executive Order 11514	17, 18, 19
Halperin, et al., "The Time Course of the Effects of Carbon Monoxide on Visual Thresholds," <i>Journal of Physiology</i> , 146(3) : 583-593 (June 11, 1959)	8
National Tuberculosis and Respiratory Disease Association, <i>Pollution Primer</i> (1969)	17
New York City Dept. of Air Pollution Control, <i>Carbon Monoxide and Air Pollution from Automobile Emissions in New York City</i> (1967)	9
Report on Carbon Monoxide Instrumentation in the Tunnels of the Triborough Bridge and Tunnel Authority (November, 1969)	9
Report Prepared by Research Branch, Broadcast Bureau, <i>Economics of the TV-CATV Interface</i> (July 15, 1970)	22
Scientist's Committee for Public Information, Inc., <i>Air Pollution in the Queens, Midtown, and Brooklyn-Battery Tunnels</i>	8, 17
Staff Report for Committee on Commerce, United States Senate, <i>The Search for a Low Emission Vehicle</i> (1969)	7, 8, 10

	PAGE
State of the Union Message, January 22, 1970	16
Supplement to 1966 Report of Mayor's Task Force on Air Pollution (October, 1969)	10-11
United States Dept. of Commerce, "The Automobile and Air Pollution: A Program for Progress (Part II)" (1967)	7
United States Dept. of Health, Education and Wel- fare, <i>Air Quality Criteria for Carbon Monoxide</i> ..	8, 9
United States Dept. of Health, Education and Wel- fare, <i>Air Quality Criteria for Hydrocarbons</i>	10
United States Dept. of Health, Education and Wel- fare, <i>Air Quality Criteria for Photochemical Oxi- dents</i>	10
United States Dept. of Health, Education and Wel- fare, <i>Sources of Air Pollution and their Control</i> (1966)	7
United States Public Health Service, <i>Air Pollution Control Report</i> (August 4, 1967)	7
Washington Post, January 26, 1969, p. B-3	7

IN THE
United States Court of Appeals
For the District of Columbia

No. 24556

FRIENDS OF THE EARTH and GARY A. SOUCIE,
Petitioners,

and

CITIZENS FOR CLEAN AIR, INC.,
Intervenor,

against

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petition for Review of Order of the
Federal Communications Commission

Motion for Leave to File Amicus Curiae Brief

Pursuant to Rule 29 of the Appellate Rules of Civil Procedure and Rule 10 of the Rules of this Court, the New York City Environmental Protection Administration moves for permission to file an amicus curiae brief in the above-captioned case. As permitted by said rules, the amicus

curiae brief is being conditionally filed along with this motion.

The New York City Environmental Protection Administration ("EPA") is that branch of the New York City government specifically responsible for reducing and preventing pollution of the environment, including air pollution. EPA has a strong interest in the outcome of this litigation, since New York City suffers from a serious air pollution problem to which gasoline powered automobiles are a major contributor (see Statement of the Case, part (b), below). The health hazard created by normal use of automobiles in New York City and the difficulties of ameliorating that hazard are intensified by automobile and gasoline advertisements on television. The City and EPA will thus be importantly affected by the Court's decision as to whether or not licensees must make free time available for reply to such commercials.

EPA has studied extensively the nature and effects of pollution from gasoline powered motor vehicles, and has developed various programs in an effort to begin dealing with the problem. Its experience as a governmental unit which is familiar with automobile air pollution and its effects in New York City should prove useful to the Court in this litigation.

EPA also wishes to submit an amicus curiae brief in order to confirm that recognition of the controversial nature of most automobile and gasoline advertising is not limited to a "vocal minority." Concern over the threat such advertising represents to the public health is shared by many governmental organizations, and it is appropriate for the Court to receive such a statement from the munici-

pality directly affected by the automobile and gasoline advertising which gave rise to the present action.

EPA respectfully requests that this Court grant leave to submit the following amicus curiae brief.

Issues Presented

WNBC-TV frequently broadcasts automobile and gasoline advertisements, often on prime time. Such advertisements solicit the purchase of products identified by the federal government and by expert public and private organizations as a serious threat to public health in their normal use. This case presents the issues of whether the Federal Communication Commission erred in refusing to hold that WNBC-TV's "Fairness Doctrine" and "Public Interest" responsibilities require allocation of a reasonable amount of free television time to responsible antipollution spokesmen for spot advertisement replies to automobile and gasoline commercials.

Statement of the Case

(a) Proceedings Below

On February 6, 1970, petitioner Gary A. Soucie, on behalf of petitioner Friends of the Earth—a non-profit organization dedicated to protecting the environment—sent WNBC-TV a letter requesting that it make available free time for response to automobile and gasoline commercials. The letter noted that WNBC-TV frequently broadcasts such advertisements; pointed out the important

contribution of automobile and gasoline sales to the air pollution crisis now afflicting New York City; and stressed that advertisements which state or imply that the good life requires an automobile also imply that increased automobile usage is consistent with preserving public health. Petitioners declared that in consequence such commercials dealt with one side of a controversial issue of public importance—namely the effect on public health of automobile and gasoline sales. The letter stated that, under the Federal Communications Commission's ("the Commission") Memorandum Opinion and Order on the Applicability of the Fairness Doctrine to Cigarette Advertising," 9 F.C.C.2d 921 (1967), *aff'd*, *Banzhaf v. FCC*, 132 App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), the "fairness doctrine" required provision of free time for responses concerning the environmental effect of automobile and gasoline usage (11-15).*

WNBC-TV replied on February 18, 1970, refusing petitioners' request. It denied that automobile and gasoline ads present one side of a controversial issue and asserted that the "fairness doctrine" ruling as to cigarette commercials was not applicable to automobile and gasoline advertising (17-20).

On March 14, 1970, petitioners filed a formal complaint against WNBC-TV with the Commission, asking for a ruling that both the fairness doctrine and the public interest responsibilities of licensees require provision of a reasonable amount of time for programming rebutting automobile and gasoline commercials (1-10). Petitioners' request was supported by submissions on June 20 from Mr. Jerome Kretchmer, Administrator of the New York City En-

* Numbers in parentheses refer to pages of the appendix.

vironmental Protection Administration (27-39), and on June 22 from Citizens for Clean Air, a non-profit private corporation organized to work for reduction of air pollution in New York City (40-43). On July 13, WNBC-TV submitted a partial listing of its environmental programming to the Commission (44-56), and Friends of the Earth commented on that list in a letter dated July 30 (56-65).

The Commission denied petitioners' request in a letter released August 7 (73-99). The majority made no determination as to whether or not automobile and gasoline commercials were controversial statements on matters of public importance. Instead, it relied primarily on findings that automobiles and gasolines were significantly different from cigarettes in that (a) "Cigarette smoking does not involve a balancing of interests"; indeed, the real question as to cigarettes was "how such a product could be promoted at all on a medium impressed with the public interest"; (b) "action can be taken effectively in these areas, and therefore the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising impact." Majority Opinion, p. 5 (79-80). It also stated that, because of the complexity of environmental problems, issues such as automobile pollution leant themselves more effectively to news, public affairs, and documentary type programming than to spot commercials. Majority Opinion, pp. 6-7 (81-82).

The majority was also concerned that in light of the many products having an environmental impact, the ruling requested would involve a general extension of the fairness doctrine to the entire field of product advertising. It

rejected any such extension, maintaining that "the result would be the undermining of the present system, based as it is on such commercials." Majority Opinion, p. 8 (83).

The majority did state emphatically that licensees have a firm obligation to devote considerable time to environmental issues, including "the question of pollution by the internal combustion engine." It found that "[l]icensees must devote a reasonable amount of time to such issues, as a most important part of their obligation to operate in the public interest." Majority Opinion, pp. 6-7 (80-81). "[T]he broadcaster does have an obligation to inform the public to a substantial extent on these important issues, *including prime-time periods*" (emphasis added). Majority Opinion, p. 10 (86). The Commission concluded that "it would be no more reasonable for broadcasting to ignore these burning issues of the seventies—which may determine the quality of life for decades or centuries to come—than it would be to ignore the issue of Vietnam or the issue of racial unrest in communities racked by this problem." Majority Opinion, pp. 10-11 (86).

Commissioner Johnson dissented from the majority's refusal to apply the rule sought by petitioner, stressing that the important consideration was not the extent to which cigarettes are similar to automobiles, but whether automobile and gasoline ads raise controversial issues of sufficient public importance to warrant application of the fairness doctrine. Dissenting Opinion, p. 4 (91). Commissioner Johnson recognized the serious health hazard created by automobiles and gasolines, the controversial and important issues raised by the advertising involved, the

inadequacy of occasional public affairs programming in counteracting the cumulative effects of frequent prime time spot advertisements, and the total absence of any evidence supporting the Commission's conclusion that granting the requested ruling would have a destructive financial impact on the broadcasting system. Dissenting Opinion, pp. 6-9 (94-97).

Petitioners filed a timely petition for review, and WNBC-TV and Citizens for Clean Air filed notices of intention to intervene.

(b) Threat to Health and Welfare of New York City Residents Created by the Normal Use of Automobiles and Gasolines

New York City and other large municipalities across the country are confronted with an air pollution health hazard of very serious dimensions. Doctors in Los Angeles advise an estimated 10,000 people annually to leave the City because of air pollution (See Washington Post, January 26, 1969, p. B-3) and the problem in New York City is at least as severe. The Public Health Service has found air pollution in New York City to constitute a substantial health problem. See United States Public Health Service *Air Pollution Control Report*, August 4, 1967.

In New York City, automobiles are among the chief offenders, as they are throughout large cities in the United States.* Automobiles contribute over 60% of the total

* See generally "The Automobile and Air Pollution: A Program for Progress (Part II)," United States Department of Commerce (December, 1967); "Sources of Air Pollution and Their Control," United States Department of Health, Education and Welfare, Public Health Service (1966); Air Pollution—Present and Future, City of Livermore Air Pollution Control Study Committee (March, 1968); "Search for a Low Emission Vehicle," Staff Report for Committee on Commerce, United States Senate, p. 2 (1969).

pollution in the New York City air, and the percentage is far higher in many areas of the City where automobile traffic is especially concentrated.

Automobiles are responsible for virtually all of the 1.5 million tons of the potentially lethal carbon monoxide dispersed each year in the New York City atmosphere. See Scientists' Committee for Public Information, Inc., *Air Pollution in the Queens, Midtown and Brooklyn-Battery Tunnels*. This toxin interferes with the capacity of the blood to transport and release oxygen to the tissues of the body, impairing a driver's vision and psychomotor performance. "The Search for a Low Emission Vehicle," Staff Report for the Committee on Commerce of the United States Senate, p. 3 (1969). Other effects of short term exposure to carbon monoxide on judgment and body functions have been observed, including severe headaches, dim vision, nausea, and collapse at 300 ppm ("parts per million"); headaches and impaired performance on simple psychological and arithmetic tests at 100 ppm; and an impaired sense of time and reduced vision at 50 ppm and below. Schultz, "Effects of Mild Carbon Monoxide Intoxication," *Arch. Environ. Health* 7, 524-30 (1963); Halperin, et al., "The Time Course of the Effects of Carbon Monoxide on Visual Thresholds," *J. Physiol.* 146 (3) : 583-593 (June 11, 1959). A serious possibility exists that continuous exposure to low levels of carbon monoxide increases chances of heart disease, strokes, and other vascular conditions. See generally, U.S. Dept. of Health, Education and Welfare, *Air Quality Criteria for Carbon Monoxide* (1970) ("Criteria for Carbon Monoxide"); Scientists' Committee for Public Information, Inc., *Air Pollution in the Queens-Midtown and Brooklyn-Battery Tunnels*.

Whereas an average carbon monoxide level of 10 ppm for an eight-hour period is the standard set by the federal government for adverse health effects (see *Criteria for Carbon Monoxide*, p. 10-6 (1970)), available information indicates that carbon monoxide levels violate that standard in many parts of the City. Reports have been received of carbon monoxide average concentrations of 70 ppm in Manhattan traffic (New York City Department of Air Pollution Control, *Carbon Monoxide and Air Pollution from Automobile Emissions in New York City*, p. 2 (1967)), and 100-500 ppm during periods of peak congestion at bridges and tunnels. See *Report on Carbon Monoxide Instrumentation in the Tunnels of The Triborough Bridge and Tunnel Authority*, p. 15 (November, 1969). See also Cruse, *The Health Implications of Airspace Construction over Highways*, p. 4 (January, 1970), published by Scientists' Committee for Public Information, Inc.

In addition to carbon monoxide, motor vehicles in New York City also emit 180,000 tons of hydrocarbons, 49,000 tons of oxides of nitrogen and 2,000 tons of lead annually. Hydrocarbon and nitrogen oxide emissions from vehicles are also major contributors to the creation of photochemical oxidants in the atmosphere:

"Some hydrocarbons interact with oxides of nitrogen in sunlight, producing odorous smog, eye irritation, and vegetation damage.

Nitrogen dioxide, one of the oxides of nitrogen, is directly toxic to man and animals. The gas is mildly irritant and may be deeply inhaled. Death and chronic respiratory diseases have resulted from exposure to nitrogen dioxide; and pulmonary damage in animals has occurred with concentrations of less than 5 parts

per million. In addition to its toxic effect on man, nitrogen dioxide is responsible for most of the atmospheric coloration problems, and in the Los Angeles area alone plant damage caused by nitrogen dioxide is estimated to be between \$6 million and \$10 million per year.

Although there is a dearth of knowledge about atmospheric lead inhalation, the toxic effects of ingested lead are well known. Lead poisoning can attack the central nervous system, peripheral nerves, smooth muscle, and reproductive organs. Current recommendations call for a 10-percent reduction of lead content per year in order to assure reduction of the public health hazard of atmospheric lead compounds.

The final major vehicular pollutants, oxidants and ozone, are irritating to exposed mucous membranes. Eye and respiratory irritation has occurred in sensitive subjects at oxidant levels as low as 0.1 to 0.15 parts per million." "The Search for a Low Emission Vehicle," Staff Report for the Committee on Commerce of the Senate, p. 3 (1969) (Footnote references omitted).

The Department of Air Resources in New York City has determined that levels of all the above pollutants in New York City frequently exceed the limits required for public health. For such limits, see, *e.g.*, U.S. Dept. of Health, Education and Welfare, *Air Quality Criteria for Hydrocarbons* and *Air Quality Criteria for Photochemical Oxidants*.

The 1969 supplement to the *Mayor's Task Force on Air Pollution* reported that the two million automobiles operating in New York City—more than half of them in Manhattan—were twice as many as the area should sustain. It further warned that "pollution from automobiles and trucks has been steadily increasing and has cut into the other gains scored in the war against environmental

poisoning." *Supplement to 1966 Report of Mayor's Task Force on Air Pollution*, p. 6 (October, 1969).

Because of such problems arising from the use of automobiles in New York City, the New York City government is studying and experimenting with various approaches to dealing with motor vehicle pollution in the City. Programs include testing of antipollution devices such as catalytic converters, evaluation of prototype vehicles operating on alternative power systems, and a ban on the sale of leaded gasoline. Other programs in various stages of implementation include restrictions on parking, expansion of street closings, improvements in traffic control, and elimination or reduction of particular kinds of traffic in high congestion areas.

On a number of occasions, City officials have called on the public to voluntarily reduce their use of motor vehicles within the City. Thus, City levels of automobile pollutants reached a sufficiently critical state on July 29, 1970 for Mayor Lindsay to request owners of private vehicles to refrain from driving their cars into Manhattan (69). Use of car pools, mass transit facilities, and bicycles for intra-city transportation have been encouraged by the New York City government. *E.g.*, (69); "Cycling Lane Likely for a Major City Street," *New York Times*, Sept. 17, 1970, p. 1, col. 6.

**(c) The Importance to the Public Welfare
of Effective Rebuttal to Automobile and
Gasoline Television Advertisements**

Automobile and gasoline advertising* has contributed to the creation of a serious health hazard in New York City and other municipalities. In addition, it threatens the effectiveness of government antipollution programs. The feasibility of many types of government emission control programs and of efforts to bar or reduce motor vehicle traffic in congested areas has not been demonstrated. In many instances, governments will have to rely heavily on citizen cooperation. Consequently, an informed citizenry is essential.

The New York City government needs local public support for its local efforts at pollution abatement, but citizen awareness is also essential because of the importance of voluntary citizen action. The voluntary reduction of automobile use in the inner city is highly desirable. In addition, basic antipollution improvements in automobiles and gasolines require public demand by individuals as consumers. Public pressure must be maintained on the automobile industry to develop a cleaner internal combustion engine, improved antipollution devices, and alternatives to the internal combustion engine itself. The public must also urge govern-

* No meaningful distinction can be made between the threat to health represented by automobile advertising on the one hand, and gasoline advertising on the other, in applying the "fairness doctrine" and defining a licensee's public interest responsibilities. Gasoline commercials inescapably advertise and encourage the purchase and use of automobiles and of the internal combustion engine. Thus, in measuring the amount of time devoted to automobile advertising on television, it would be misleading not to include the time allotted to gasoline commercials. Moreover, whereas automobiles fail to protect against pollution from combustion of fuels, the fuels themselves contain lead and other toxic elements.

mental organizations to fund efforts by groups independent of the automobile and gasoline industry to develop pollution-free cars and safer gasolines. A nationwide prohibition on the sale of leaded gasoline should be promoted.

However, the conception and thrust of automobile and gasoline commercials today run directly counter to the development of the public awareness which is required for automobile pollution to be significantly reduced. Rather than encouraging viewers to minimize their use of high-polluting automobiles and to bring pressure on companies to make non-polluting vehicles, broadcasters bombard New York City residents with advertisements which encourage them to use the hazardous products currently being manufactured. Presentation of these commercials without providing antipollution spokesmen opportunities to reply in a manner and at times reasonably well calculated to make an impact on the same general audience which sees such commercials is fundamentally inconsistent with the public interest.

ARGUMENT

The fairness doctrine and the public interest require provision of free television time for spot advertisements to rebut automobile and gasoline commercials encouraging use of products which create serious health hazards. The Commission's refusal so to hold was arbitrary and an abuse of discretion.

- (a) **The Fairness Doctrine as Enunciated in the Cigarette Decision Requires WNBC-TV to Provide Free Television Time for Spot Advertisements Replying to Automobile and Gasoline Commercials.**

In *Banzhaf v. FCC*, 132 App. D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), this Court affirmed the Commission's holding that, under the "fairness doctrine" and in fulfillment of public interest responsibilities, television stations which regularly present advertisements which portray smoking as a desirable habit must make a reasonable amount of free time available for comment by responsible persons or groups on the hazards of smoking. Memorandum Opinion and Order, 9 F.C.C. 2d 921 (1967). The "frequency of the presentation of the one side and the nature of the potential hazard to the public" was held to require "presentation of the opposing viewpoint on a regular basis (e.g., each week)." 9 F.C.C. 2d at 941.

The fairness doctrine was applied to cigarette commercials despite the lack of any express claims in such commercials concerning the health effect of smoking. The Commission stressed that cigarette advertisements portrayed the desirability of smoking "in terms of the

satisfaction engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, * * * and by so doing the impression is conveyed that smoking carries relatively little risk." 9 F.C.C. 2d at 938. Conveyance of the impression that smoking is safe was held to constitute a controversial statement on an issue of public importance, warranting application of the fairness doctrine.

The Commission defined as "key factors" in its decision:

"(1) Governmental and private reports and congressional action with respect to cigarettes, and (2) their assertion in common that normal use of this product can be a hazard to the health of millions of persons." 9 F.C.C. 2d at 943.

Those factors which compelled application of the fairness doctrine to cigarette commercials also require its application to ads for automobiles and gasolines. Automobile and gasoline commercials are similar to cigarette advertising in that they stress the enjoyment and excitement of driving and leave the impression that driving creates little risk to the public health. Thus the absence of any overt discussion of the pollution issue in such commercials in no way negates their status as controversial statements of public importance.* See, e.g., *Retail Store Employees Union v. FCC*, — App. D.C. —, — F.2d —, No. 22,605, decided October 27, 1970, slip sheets pp. 20-21.

* It should be noted that gasoline companies have in fact begun to make representations with respect to pollution. See, e.g., Esso's "Big Plus" advertising.

Moreover, as indicated above in the discussion of the health effects of automobile air pollution, both governmental and private reports and programs recognize that gasoline powered automobiles are dangerous to the public health in their normal use.

Recent acts and statements by the United States Congress and the President of the United States accord a priority to abatement of air pollution—and especially pollution from automobiles—which is virtually unprecedented in its recognition of a particular health hazard as a menace to the American public as a whole. Thus in his State of the Union message, January 22, 1970, President Nixon declared that treatment of pollution of the environment “has become a common cause of all the people of America” and identified the automobile as “the worst polluter of the air.”

The United States Air Quality Act, 42 U.S.C. §1857, deals specifically with air pollution, and expressly find that

“the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare * * *” Sec. 101(a)(2).

The Act provides for research and development relating to fuels and vehicles (Sec. 104), and for the development and enforcement of national emission standards for motor vehicles (Secs. 201-212).

The National Air Pollution Control Administration has recognized the danger to public health from automobile air pollution, and has issued air quality criteria for carbon

monoxide, hydrocarbons and particulate matter. It has also issued criteria on photochemical oxidants, which result indirectly from automobile pollution and figure importantly in life endangering smog.

The similarity of danger from cigarettes and the evils of automobile pollution is underscored by evidence that air pollution generally, and automobile pollution in particular, has a particularly detrimental health effect on smokers. See, *e.g.*, National Tuberculosis and Respiratory Disease Association, *Pollution Primer*, pp. 71-72 (1969); Scientists' Committee for Public Information, Inc., *Air Pollution in the Queens-Midtown and Brooklyn-Battery Tunnels*.

Indeed, unrebutted automobile advertising constitutes a more serious invasion of the public's right to disclosure of health hazards than does cigarette advertising, in that direct physical injury from cigarettes is limited to those members of the public who choose to smoke. Automobile pollution affects the health of all members of the public whether or not they use automobiles.

Federal policy includes both the development and dissemination of information concerning pollution (see, *e.g.*, Air Quality Act, Secs. 103-104; Environmental Quality Improvement Act of 1970, Tit. II of H.R. 4148, 91st Cong., Approved April 3, 1970, Sec. 203(d)(4); Executive Order 11514, Secs. 2 and 3) and encouragement of efforts by members of the public to confront the problem, a policy which presupposes a public which is knowledgeable on the pollution issue. See, *e.g.*, National Environmental Policy Act, Sec. 101(c): "each person has a responsibility to contribute to the preservation and enhancement of the environment."

See also Executive Order 11514, Sec. 2(b). The analogy to the federal policy of disseminating information on cigarettes, which played a part in the Commission's application of the "fairness doctrine" to cigarettes, is clear. See 9 F.C.C. 2d at 933.

Congress has in fact declared the elimination of environmental pollution a public policy of unique importance.

In the National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852:

"The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment * * * and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government to use all practicable means and measures in a manner calculated * * * to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Sec. 101(a).

Congress further recognizes that:

"each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." Sec. 101(c).

The importance of this policy is illustrated by the Act's mandate that:

"to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be

interpreted and administered in accordance with the policies set forth, in this Act." Sec. 102.

The Act directs all federal agencies to study the environmental impact of their programs, policies, regulations, and statutory authority and to strive to bring them into harmony with the Act's purpose of protecting the environment. Sec. 102. In addition, the Act creates a Council on Environmental Quality which will try to assure that the various activities of the federal government take due account of environmental considerations. Secs. 201-204. See Executive Order 11514. Additional support and machinery for the implementation of such policies are provided in the Environmental Quality Improvement Act of 1970, Tit. II of H.R. 4148, 91st Cong., Approved April 3, 1970.

Thus, recognition by Congress and the President of the existence of a major public health hazard and the priority they have accorded to dealing with that hazard is, if anything, more clear and dramatic in the case of environmental pollution than it was in the case of cigarettes. Indeed, the requirement of the National Environmental Policy Act that all federal agencies construe their policies, regulations, and authorizing statutes for consistency with the purposes of the Act indicates that any doubt whether the fairness doctrine applies to automobile and gasoline advertising should be resolved in favor of coverage.

As the discussion in Statement of the Case parts (b) and (c) above and the very submission of this brief indicate, the Mayor and other officials of the New York City government have joined with the federal government in identifying automobile air pollution as a health hazard of unusual importance.

The reasons presented by the majority of the Commission for treating automobile/gasoline advertising differently from cigarette advertising are: (a) that, unlike use of automobiles and gasolines, cigarette smoking "does not involve a balancing of competing interests" (Majority Opinion, p. 5) (79-80); (b) unlike the situation with regard to cigarettes, effective government action with respect to automobile pollution other than education of the public is a practical possibility (Majority Opinion, pp. 5-6) (80); (c) a general extension of the fairness doctrine to the field of product advertising would undermine the commercial system of broadcasting (Majority Opinion, p. 8) (83).

These reasons are unconvincing, and insufficient to support the decision.

First, the basis for application of the fairness doctrine is not the absence of competing interests, but rather, the publication of controversial statements on an issue of public importance. *E.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369 (1969). As the Dissenting Opinion below points out:

"The question is not whether pollution of the lung differs from pollution of the air, or whether the products are manufactured or used differently, but whether advocacy of their use raises an issue of controversy and public importance sufficient to invoke the fairness doctrine." Dissenting Opinion, p. 4 (91)

Moreover, the majority's premise that no competing interests are involved in decisions concerning promotion, sale and use of cigarettes is incorrect. While the health hazards of smoking have certainly been demonstrated, the enjoy-

ment and psychological release which many millions of people find in smoking and the contribution to the economy of cigarette production and sales are factors which many people would weigh before reaching conclusions as to the desirability of an outright ban on cigarettes.

Second, the fact that more forms of governmental action may be available for dealing with automobiles and gasolines than for dealing with cigarettes* has no bearing on the public interest in the broadcasting of rebuttals to automobile and gasoline ads. The fairness doctrine is grounded in the critical importance to public understanding of presenting both sides of significant controversial issues. See generally, *In the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). The theoretical availability of government programs does not mitigate the need for a meaningful presentation of both sides of the issue; indeed, a well-informed public is a prerequisite of effective governmental action. In a recent decision concerning application of the fairness doctrine this Court declared that:

"As the doctrine has developed, its central purpose has become increasingly clear. That purpose has been to insure both that the listening public is presented with information regarding controversial issues of public importance, and that facts, analysis, and argument supporting all reasonable positions on a given issue are aired by the broadcasters. *That is, central to the fairness doctrine is the promotion of informed decision-making by the public by insuring that the facts and arguments relevant to decision are made available to*

* This is not necessarily true: evidence has not been presented as to the possible results of high priority governmental and industry programs to improve the safety of cigarette smoking. Indeed, the Commission dismissed evidence that such programs could have an impact as irrelevant when it ruled on cigarette advertising. 9 F.C.C. 2d at 949.

the listening audience." *Retail Store Employees Union v. FCC, supra*, slip sheet p. 17 (emphasis added)

Third, the majority's reliance upon the economic impact of extending the fairness doctrine to product advertising generally ignores the real issues and has no basis in the record. No request is made for an application of the fairness doctrine to all product advertising, or even to all advertising of products having an adverse environmental impact. Petitioners' claim is only that the fairness doctrine should apply to those products which, like cigarettes, have been found by governmental and private organizations to constitute a serious threat to public health in their normal use. There is no evidence to support the view that the number of products meeting such a criterion would be large or that licensees will incur serious financial losses if a reasonable amount of free time for reply to such commercials were required. As the discussion above demonstrates, governmental reports and statements have accorded automobile pollution a virtually unique status as a recognized and pervasive threat to the public health.

Moreover, no information was presented to the Commission concerning the economic impact of anti-automobile advertisements or even of a broader range of environmental advertising. The Commission rejected arguments concerning economic impact in making its cigarette decision (9 F.C.C.2d at 943-45), and reports of the Commission's own staff indicate that stations such as WNBC-TV may be able to absorb significant cost increases without impairing their ability to operate. See, *e.g.*, Report prepared by Research Branch, Broadcast Bureau, *Economics of the TV-CATV Interface*, pp. 16-17 (July 15, 1970).

The commercial broadcasting system survived the application of the fairness doctrine to cigarette advertising, and mere speculation concerning economic impact is not a proper basis for rejection of the rule requested in the case at bar. See Dissenting Opinion, pp. 8-9 (96). Application of the fairness doctrine to automobile and gasoline advertising can always be reconsidered should harmful economic consequences actually begin to materialize. *Cf.*, *Red Lion Broadcasting Co. v. FCC*, *supra*, p. 393.

As the Dissenting Opinion below points out, the Commission's primary responsibility is not to preserve the commercial system of broadcasting but to assure that licensees operate in the public interest.

"The ultimate rationale for denying the complaints here is that, to use the majority's language, 'the result would be the undermining of the present system [of American television], based as it is on the product commercials. Such a result is not consistent with the public interest.' I cannot believe that the majority finds it more important to preserve the commercial broadcast system than *life itself* on our planet. Yet this may be the result of their action." Dissenting Opinion, p. 8 (96) (emphasis in original).

It is by no means clear that commercial broadcasting could not survive despite a substantial increase in free time for public interest advertising. However, no system of broadcasting can possibly serve the public interest which involves the frequent presentation of commercials for products which threaten the public health but does not include the provision of time for meaningful and effective rebuttals of such advertisements.

(b) WNBC-TV's "Public Interest" Responsibilities also Require Free Time for Advertisements Rebutting Automobile and Gasoline Commercials.

The danger to health from automobile pollution also requires WNBC-TV to present regular statements on automobile and gasoline hazards in order to fulfill its obligation to serve the public interest. See 47 U.S.C. §§303(g), 309 (a), (d), 315. In its opinion affirming the cigarette ruling, this Court stated:

"The ruling originated in response to a 'fairness doctrine' complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that 'it clearly has the authority to make this public interest ruling' under the public interest standard of the Communications Act and relied upon 'the licensee's statutory obligation to operate in the public interest.' * * * [W]hether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same." *Banzhaf v. FCC*, 132 App. D.C. at 23-24, 405 F.2d at 1091, 1092.

The Court also declared that:

"Whatever else it may mean, however, we think the public interest indisputably includes the public health. There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. * * * The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends. * * *" 132 App. D.C. at 28-29, 405 F.2d at 1096-97.

See also *KFKB Broadcasting Ass'n, Inc. v. Fed. Radio Com'n*, 60 App. D.C. 79, 47 F. 2d 670 (1931).

The Commission itself emphasized in its cigarette decision that where statements creating a possible danger to health—as opposed to other types of statements having public importance—are made on television, the licensee is under an especially high duty to inform the public about the hazard involved:

“Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death. *In the circumstances, we think that the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard.* As indicated in our ruling, and in light of the considerations set forth in paragraph 33-34 and 60-61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (*e.g.*, each week).” 9 F.C.C. 2d at 941 (emphasis added).

While in the cigarette case this Court cautioned that the Commission “may not be authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health” (132 App. D.C. at 29, 405 F.2d at 1097) the clear and special danger to public health which it saw as justifying the cigarette decision is equally present with respect to automobiles and gasolines. See 132 App. D.C. at 29-30, 405 F.2d 1097-98, and Statement of the Case above, part (b).

**(c) Failure to Allow Free Time for Advertisements
Rebutting Automobile and Gasoline Commer-
cials Deprives the Public of any Meaningful
Reply to Such Commercials.**

The majority did declare strongly that, under the public interest standard, licensees must devote considerable time to news, public affairs, and documentary type programming on environmental issues, including "the question of pollution by the internal combustion engine." Majority Opinion, p. 6 (80). It recognized that environmental problems constitute the "burning issues of the seventies—which may determine the quality of life for decades or centuries to come. * * *" Majority Opinion, pp. 10-11 (86).

But while public affairs programming can be a valuable contribution to the public interest, it does not provide a realistic system for countering the effect of automobile and gasoline advertisements. Such commercials are essentially calculated to persuade, employ advanced advertising techniques, and are sandwiched within popular programming so that viewers will see them regardless of the viewers' interests or preferences. The types of environmental programs required by the Commission will be discussions of the problem, will not be aimed primarily at persuading, and may not contain strong and dramatic statements concerning the danger to public health from automobiles. Automobile and gasoline commercials are seen by millions of people who see them automatically while watching entertainment programs. Such persons may never watch a documentary, leaving an important segment of the American public substantially uninformed. Thus, in its cigarette ruling, the Commission rejected the argument that WCBS-

TV's news and public affairs programming constituted an adequate reply to cigarette advertising. See 9 F.C.C.2d at 922.

Automobile and gasoline advertisements occur with great frequency. The occasional mention of automobile pollution on a documentary program cannot conceivably be an effective reply to such commercials. Thus, in affirming the Commission's cigarette ruling, this Court stated:

"In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media * * * inadequately inform the public of the extent to which its life and health are most probably in jeopardy. *The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood.* A man who hears a hundred 'yeses' for each 'no', when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed." (emphasis added) 132 App. D.C. at 31, 405 F.2d at 1099.

In a more recent decision, this Court noted that:

"although as a general matter equal time is not required so long as a reasonable opportunity is afforded for the presentation of opposing viewpoints, the Commission has upon occasion recognized that time, rather than information, is of the essence." *Retail Store Employees Union v. FCC*, *supra*, slip sheet p. 18.

In the present case only the presentation of spot advertisements on a regular basis, and frequently during prime time, will assure an effective reply to the barrage of automobile and gasoline commercials broadcast daily by television stations such as WNBC-TV.

Conclusion

The New York City Environmental Protection Administration respectfully requests that this Court reverse the ruling of the Commission below and hold that WNBC-TV must make a reasonable amount of free time available to responsible antipollution spokesmen for spot advertisement replies to automobile and gasoline commercials.

Respectfully submitted,

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